United States Court of Appeals

for the Second Circuit

APPENDIX

75-7060
75-7641

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JAPAN AIR LINES CO., LTD.,

Plaintiff-Appellee,

-against-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ("IAM"), et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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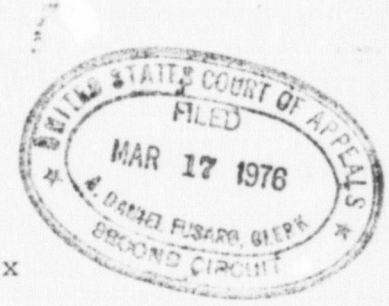
VOLUME II



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I am now talking about the question of where this case should have been brought.

It is our belief -- by the way, Local or District 151, which is the party negotiating this particular agreement is located in Honolulu. Presently there are negotiations going on right now -- well, early in the morning over in California. As of last night I know they were going on because I got a telephone call at home. That is where the negotiating team is located. The offices are located. That is where most of the employees are located or in the vicinity, and it would appear that pursuant to Section 1404 of the Judiciary Law and Judicial Procedure, 28 USC 1404, this case should have been brought for the convenience of the parties on the west coast.

THE COURT: Let's go back one step. Are you now going to argue to me that there is no jurisdiction here, that the venue is improper here or that the case, while it could have been brought here, should be transferred under 1404(A) because of, well let's say, the convenience of the parties and witnesses?

MR. ENGELHARD: Precisely. 1404(A).

THE COURT: You do not contest the fact there is jurisdiction here or that there is venue here but the convenience of the parties as set forth in the provisions of

the transfer section to which you have just referred dictates the Court exercising its discretion to transfer the litigation to the west coast.

MR. ENGELHARD: Absolutely. While it was even questionable whether there was a proper service, we know as a practical matter if we contested that and we were successful, the plaintiff could go to California where everyone is and serve them. We are not trying to engage in that kind of tactic, but we do believe that 1404 was meant precisely for this type of situation.

Let me go a step further. What would be the effect if this case stays here or if you, for example, put over the hearing on a motion for a temporary injunction several days? The deadline or the expiration of this 30-day cooling-off period is either midnight the 21st or midnight the 22nd. The union is taking a position if they do resort to self-help, they will not do it until the 23rd.

THE COURT: So I understand. That point was made in the papers. As a matter of fact, the application that I received in the papers, as you undoubtedly noted, is that the case should be, this order to show cause should be made returnable next week. I was unable to oblige the plaintiff because of my very heavy schedule beginning on Monday of next week and, therefore, I put the case down for today since

I have the day to hear you and to take any testimony which would be required.

So I am aware that the so-called deadline presently being considered would be approximately the 23rd. I am aware of that.

MR. ENGELHARD: Your Honor, we did not know what the underlying facts were except for those facts alleged in the papers until yesterday when we were able to finally communicate with the people over in San Francisco. If the people in San Francisco, the defendants, or witnesses that we will need had to leave to come here and testify, it will be self-defeating because hopefully the parties will be able to negotiate a settlement and to take them away for the purpose of preparing affidavits or for giving testimony, again would be self-defeating, it would take them away.

THE COURT: The Court obviously wishes to encourage parties, including these parties to negotiate their own agreements without the necessity of the Court interfering. At the same time, though we try to be responsive to the wishes of the parties, a busy court such as this cannot always schedule its hearings to coincide precisely with the schedules of a myriad of individuals, so that is one of the reasons why you are here and I am prepared to hear you further and to work with both parties in an attempt to be

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I am put in a position where I cannot properly defend your application and he says I would ask, for example, for a continuance. I do not want a ruling or a restraint. There is still another week to go in the negotiations and I want to have the opportunity to come in.

That would be fine if this Court didn't have the scheduling problems which I have which will at least completely tie this Judge up next week in a multi-defednant criminal case.

Now, I recognize what you may say to me that there is an emergency judge here at the courthouse.

MR. GARTNER: I will not say that, your Honor. Your Honor has just revealed something which I was about to ask because I was not sure from your previous comments whether you are free after next week. You contemplate that the trial which starts on Monday will last approximately a week.

THE COURT: That is the point. I don't know. It is a seven or eight defendant narcotics conspiracy case and I have learned from experience that one can't predict the duration of a multi-defendant multi-count criminal indictment which starts off with conspiracy and goes from there.

MR. GARTNER: I understand. Of course it may go

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on longer or it may suddenly evaporate if there are pleas.

THE COURT: I have gotten a few but I am only down to seven or eight defendants.

MR. GARTNER: I have a counterproposal which is only a slight variation of what the Court has proposed and that is, of course we don't want to force the defendants to a hearing when they are unprepared and we want them to have adequate time to prepare and respond in appropriate time and manner. I would suggest that they consent to maintain the status quo until such time as this Court is prepared to conduct a hearing which only means that they may have to wait two or three or four days after the 23rd.

THE COURT: Well, you might make a proposal that would have a cutoff date to that consent. I think they would be loathe to, and I don't think counsel could do it even after a telephone call, give consent open ended.

Assuming for the moment that this particular judge was tied up in the case I mentioned for a longer period than all of us anticipate, then we have of course the possibility of my sending you, which I could do, to the emergency judge. As I say, I am reluctant to burden an already busy brother judge but needless to say if the interests of justice require it, I would do that.

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I just don't want them to be in a position where they consent to something that is open ended as to point of time.

MR. GARTNER: There could be a cutoff date. It could be the end of the month.

After all, it is really no great deprivation --

THE COURT: The end of the month isn't bad, really because they are already going to the 23rd and you are talking about a week.

MR. GARTNER: There is no great deprivation not to strike, particularly in these days.

THE COURT: They want a bargaining weapon and I am not prepared to say I will take it away from them immediately, although the strike still looms on the ultimate horizon.

MR. GARTNER: As a matter of fact, your Honor, it is detrimental to us to propose an extension of the time during which they could bargain because the customary union approach is to try to continue to get something as long as there is still a possibility of getting something, so what I am suggesting really is going to add eight days to our need to bargain with them and that is not something that we look forward to with great anticipation, because we have been bargaining with them already for almost a

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reported and of course he was not there so I don't blame him for not knowing precisely what happened, but Mr. Kuramoto was there and what happened after the opening session yesterday was that Mr. Quick, who up until this time has refused to talk about these 35 other issues until the company made an agreement on scope, Mr. Quick said he had heard from New York that the company had begun an action here in which we were challenging their right to insist upon scope and that he is now ready to discuss the 35 issues; so the fact that the 35 issues are open is not because Japan Air Lines has not been willing to discuss them.

THE COURT: Thank you, Mr. Gartner.

The Court's suggestion has been rejected by the plaintiff as is plaintiff's right. I was thinking about your application for a transfer. They have come back with a proposal which is a temporary restraining order on consent until January 31, 1975 with the case remaining here.

You might say that is the same thing I would get after a hearing except if we went to a hearing on a preliminary injunction, I suppose if the preliminary injunction were granted and you are in the unfortunate position of not having the papers or personnel here to argue the point you would have certain findings on the merits which would

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have to be overturned and I think the job would become more difficult from your point of view than if we could preserve the status quo for what would be two weeks from tomorrow or some eight days after the time the union had indicated an intention to strike. I don't find that a horrible proposal. It takes you out of what can be a very difficult position this morning not having witnesses and not having papers and I don't fault you for that. I recognize you were just served.

Let me hear from you.

MR. ENGELHARD: If your Honor please, when I came in here this morning on the application under 1404, it was not made very lightly and of course you do have the discretion to grant this application. I did last night see what the statute says and see what the ~~Commons~~ Comment says and a reading from Moores, they cite the case of Gulf Oil versus Gilbert.

THE COURT: We use it regularly in the decisions which we file on transfer motions and I seem to file a decision about every two weeks and they go each way and in the Gulf Oil case --

MR. ENGELHARD: The few comments that struck me was the cost of obtaining the attendance of unwilling witnesses and the problems that make the case expensive.

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Quick.

MR. ENGELHARD: The two chief negotiators for the union are Mr. Quick who lives in California and Mr. Ogoshi who lives in Honolulu. The other witnesses are probably witnesses, are people who are listed --

MR. GARTNER: Page 5 of the complaint. Three of them are New York people, three of them are Hawaii people and three of them are California people.

THE COURT: I don't have the complaint.

MR. GARTNER: May I hand up a copy.

It is evenly distributed, three, three and three.

MR. ENGELHARD: The median point would be California. That is in addition to Mr. Quick and Mr. Agoshi, so I think the scales are balanced in our direction.

THE COURT: The plaintiff's choice of forum must be given weight and frankly I would be inclined to tell you, although I would certainly want to have everything before me that my present inclination would be to leave it where the plaintiff put it just as if you had moved first, for example, in California for a declaratory judgment.

I would have left it there if this was the lineup.

MR. ENGELHARD: Your Honor, now we are placed in a position where a counterproposal, for example is made, that we would have to consent in text to a temporary

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restraining order something beyond which the law provides under the Railway Labor Act.

THE COURT: You could really consent to that for ten days beginning on the 23rd and then it would expire ten days later.

MR. ENGELHARD: I recognize that. What I meant was under the terms of the Railway Labor Act where we would have a right to self-help if we so chose on the 23rd of January.

THE COURT: How you would be hurt except you would love to get on strike and get everybody to go out on the job in this economy we have now, people need everything they can get. We are not talking wages and you are not telling me this is a sweatshop operation.

MR. ENGELHARD: Your Honor, I can't substitute my judgment as a lawyer.

THE COURT: I am not asking you to.

MR. ENGELHARD: As to why they should go out on strike or why they shouldn't I am not in a position to do that. What I am saying though, you say you weren't inclined to go along with our laches argument and that here then, the plaintiff knows, plaintiff's counsel knows where the people are, where most of the people are. They know where negotiations are taking place. They wait

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11:00, that we take a ten minute recess and then we will proceed to the evidentiary hearing. I can see no other alternative.

MR. ENGELHARD: Your Honor, is my application for a continuance being denied?

THE COURT: It is.

We will proceed with the taking of testimony at 11:30.

(Recess.)

THE COURT: You may proceed, Mr. Gartner.

MR. ENGELHARD: If your Honor please, may I state for the record my exceptions to the decision not to grant the application for either transferring the case to California or for a continuance.

We had stated earlier that all of the union personnel who have knowledge of the dispute or the facts surrounding this matter are presently in California. They are not here in New York and not able to be here in time for a hearing today.

Additionally, we believe denial of the application either for a continuance or for a transfer, in effect, will frustrate and does frustrate the purposes of the Railway Labor Act in terms of trying to stabilize industrial relations between carriers representatives and

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their employees.

We believe we have a fundamental right to present witnesses and in fact we do not have that right because of the time schedule and we believe that this Court further lacks jurisdiction over this matter in that it is contrary to the provisions of the Railway Labor Act which provides for certain procedures which have been followed and that presently we are in a 30-day cooling off period and that any ~~ordinary~~, temporary restraining order or order of this Court for an injunction would be beyond the scope of the provisions of the Railway Labor Act come January 23, 1975 and would be contrary also to the provisions of the Norris LaGuardia Act.

THE COURT: The application is in all respects denied. So the record will be clear, the application for a transfer made orally is in this Court's view inadequate to meet the standards which would be required of a defendant seeking a transfer from this district where the action could have been brought to California which would be the district the defendants would like to litigate.

I would suggest that the presentation made before the recess led the Court to the conclusion that the convenience of the parties and of the witnesses dictates the action being retained in this forum, the forum in

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which the plaintiff chose to bring the action. Needless to say, if at some point in the future you wish to make your application on papers, the Court will consider it, but I would suggest that I have considered the oral application to be a proper motion to transfer and I have denied it so unless you could come up with some startlingly different information than you have presented now, I think the matter of a transfer can be considered put to rest.

Relative to your request for a continuance.

While I recognize that your witnesses are not here today, I can only suggest that you will have the opportunity to cross examine the plaintiffs witnesses and to argue that the plaintiff has not made the strong showing required in order to obtain a preliminary injunction.

I would suggest further that at the conclusion of the taking of testimony today, it is my present intention to reserve decision and I will hear you further on whatever applications you wish to make once the plaintiff has presented the witnesses who are here in court.

Mr. Gartner, you may proceed.

MR. GARTNER: Thank you, your Honor. I would call Mr. Wayne Kuramoto.

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identification.)

Q Will you tell us, please, Mr. Kuramoto, what Plaintiff's Exhibit 1 is?

A These are the proposals or Section 6 presented by the company of the Railway Labor Act.

Q Did you receive a copy of that?

A Yes, I did.

Q At or about the time that Plaintiff's Exhibit 1 is dated, September 27, 1973?

A That is correct.

MR. GARTNER: I offer this in evidence, your Honor.

MR. ENGELHARD: No objection.

(Plaintiff's Exhibit 1 received in evidence.)

xx

Q Following receipt by Japan Air Lines of Plaintiff's Exhibit 1, did negotiations between Japan Air Lines and the International Association of Machinists begin?

A Yes, sir.

Q Can you tell us approximately what day?

A I believe it was November 23, 1973.

Q I call your attention to a proposal on the first page of the proposals under Article 1, scope of agreement, paragraph D.

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THE COURT: Where is that?

MR. GARTNER: The first page of the proposals after the covering letter.

THE COURT: It says Article 1, scope of agreement, paragraph D.

Q In the first or subsequent meetings between the union, the IAM and JAL, did the company give a response to that particular proposal?

A Yes, the company did respond to it.

Q What response did the company give?

A That the company is not in a position to negotiate that specific proposal.

Q At subsequent meetings, did the union raise that question again, the question of that so-called scope proposal?

MR. ENGELHARD: Objection.

Can it be identified as to which meetings he is talking about.

THE COURT: Yes. That is reasonable. It is a form objection.

Would you restate your question.

Q What subsequent meetings did occur between JAL and the IAM for the purposes of negotiating?

A We met at least four times in negotiations.

rkrf 25 Kuramoto-direct

Q Can you tell us the approximate dates of those meetings?

A I can tell you the months in which the first negotiations were held in November.

Q 1973?

A Yes. Then the second negotiations, I believe sometime in December and then the third in January and a fourth, I believe the ending of January.

Q Pardon?

A The ending of January.

Q 1974?

A Yes.

Q Who was present at these meetings representing the union?

A All of the nine committeemen that were indicated on the court papers.

Q If I may interrupt, have you read the complaint and affidavit that have been filed in this action?

A Yes, I have.

Q When you refer to the court papers, if I may hand you a copy of the summons in this action, are you referring to the committeemen listed in that caption?

A That is correct.

Q Would you please read their names for the record?

A Rollo Savino, Gregory McLaughlin, William Whitbread. He was not in the first negotiations. He was a replacement for one of the other committeemen.

Q Who was the committeeman there originally?

A Mike Puglio.

Max Suzuki, Tatsuo Shiraishi, Yoshiaki Karashima, Gary Hiroshima, Hiroshi Tarumi.

Q In addition to those committeemen for the union, who also, if any, represented the union?

A The union was represented by Mr. Fusao Ogoshi and Mr. Robert Quick.

Q Were you present at all of these meetings to which you referred?

A Yes, I was.

Q In the four negotiation sessions which you have identified, after the first session at which you have already related the union's reiteration of its scope proposal as stated in its opposing Section 6 notice, did the union in the subsequent meetings that you have identified bring up that subject again?

A Yes, they did.

Q What did they say and who said it, if you can remember?

A Mr. Quick at almost all of the sessions, all

of the meetings on the first day asked the company whether the company's position has changed on the scope issue.

Q Who responded for the company?

A Mr. Yonemura.

Q What did he say?

A He said no, the company's position has not changed.

THE COURT: When was that?

THE WITNESS: These were the first and second meetings of the sessions of the negotiations.

Q Did there come a time when a request was made for the mediation service of the National Mediation Board?

A Yes. At the end of the fourth and last negotiating sessions, it was agreed that we were deadlocked. The parties agreed they were deadlocked and decided to file for the services of the National Mediation Board.

Q Was there any comment in this agreement about being deadlocked with respect to the scope issue?

A Yes. Mr. Quick made comments that unless the union -- I am sorry -- unless the company is willing to negotiate the scope issue as far as the union is concerned, we are at a deadlock.

Q In response to that statement, the company asked the Mediation Board to intervene?

A That is correct.

Q When was the first session held between the company and the union with the participation of a mediator from the National Mediation Board?

A The first meetings were held in June of 1974.

Q Were the union demands reviewed at that time?

A Yes, for the sake of the mediator, the demands were reviewed individually.

Q Who was the union spokesman and what did he say with respect to the scope proposal?

A Mr. Quick was the union spokesman and his question was the same as all previous negotiating sessions, is the company in a position to offer a proposal on scope, or has the company's position changed on the scope question.

Q What was the company's response?

A The response was that no, the company's position has not changed.

Q How many sessions were held under the auspices of the Mediation Board?

A There were four sessions held.

Q Can you give us the approximate date of those sessions?

A The first sessions were held in June. The second session --

Q June 1974?

A Yes. The second session was held in July '74 and I believe August of '74 then the final session in November '74.

Q Addressing yourself to the sessions that were held in November 1974, who was the spokesman for the company at those sessions?

A Mr. Yonemura was a spokesman for the first three sessions.

THE COURT: We are now up to the fourth session. Who was the spokesman at that time?

THE WITNESS: I was the spokesman at that time.

Q That is in November 1974?

A That is correct.

Q What were the precise dates of that session?

A November 12th and 13th.

Q Will you tell us what if any proposals the company made on November 12th?

A I am not sure exactly the number on the 12th, but for the 12th and 13th, the company made a total of ten proposals.

Q Additional proposals to what they had already offered?

A Additional plus acceptance of some of the union's

proposals.

Q What was the union's response to these proposals which the company made?

A There was no response.

Q Was Mr. Quick still the spokesman for the union?

A Yes, he was.

Q What did he say as the company was making one proposal after another? If he said anything.

MR. ENGELHARD: If your Honor please, perhaps this application should have been made previously. We are getting into an area which is obviously very important. I don't know whether or not this gentleman was present.

MR. GARTNER: He was not present.

MR. ENGELHARD: If he is not going to testify to these events, I will not make the motion to sequester.

THE COURT: Let me ask this question.

The gentleman in the back, your other witness, do you propose to call him?

MR. GARTNER: Yes.

THE COURT: Do you propose to call him to testify on any of the events on which this witness will be testifying?

MR. GARTNER: No, your Honor.

THE COURT: Any request?

MR. ENGELHARD: I withdraw the application, your Honor.

MR. GARTNER: May I have the last question?

(Record read.)

Q That is Mr. Quick, I am talking about.

A He replied no matter what proposals the company presents, if there is no proposal on scope, there is no agreement.

THE COURT: Let me ask you this:

Did he agree on behalf of the union to any of the company proposals that were put forward on matters other than scope?

THE WITNESS: Yes.

Q Did the union at that time discuss all of the open proposals that remained open at that time?

A At this last session, November 13th?

Q Yes.

A No, we did not discuss all of the open proposals.

Q Was any comment made by Mr. Quick or any other representative of the union as to why those proposals would not be discussed?

A Yes. Bill Ogoshi remarked, unless there is a scope concession by the company included, they could not have an agreement, or accept any of the company's proposals

other than scope.

Q After that session --

THE COURT: Let me hear that answer again.

(Record read.)

Q Do you know, Mr. Kuramoto, how many of the union's proposals were at that time open for discussion and how many of the company's proposals were still open for discussion?

A There were four or five company proposals and I am not too sure as to the exact number of the union proposals, but approximately 64, 65.

Q After both Mr. Ogoshi and Mr. Quick had said that there was no possibility of an agreement unless the company offered concessions on the scope proposal, did the negotiation session continue or did it end?

A It ended.

MR. GARTNER: May I have this letter, please, marked as Plaintiff's Exhibit 2.

THE COURT: Mark it, please.

(Plaintiff's Exhibit 2 marked for identification.)

xx

Q I show you a letter, Mr. Kuramoto, dated December 26, 1974 and ask you whether you can identify that letter?

A This was a letter sent by the company and signed

I think that is clear, and since it was written by an officer of the company, it obviously represents the company's version of the negotiations and I recognize that the defendants do not concede that the company's version is accurate.

Q Mr. Kuramoto, subsequent to the statement of the company's position on the so-called scope issue in this letter which is Plaintiff's Exhibit 2, was there any change in the union's position about its insistence on getting a scope concession from the company?

A No.

Q What did the National Mediation Board do after November 26, 1974?

A Under the procedures of the Railway Labor Act and upon recommendation from the mediator, the Board proffered arbitration to both parties.

MR. GARTNER: Would you mark this as Plaintiff's Exhibit 3.

(Plaintiff's Exhibit 3 marked for identification.)

Q Is this the proffer you refer to?

A Yes, sir.

MR. GARTNER: I offer that in evidence, your Honor.

THE COURT: Any objection?

MR. ENGELHARD: No, your Honor.

THE COURT: It is received.

(Plaintiff's Exhibit 3 received in evidence.)

Q Subsequent to that proffer, do you know what the company's response was?

A Yes. The company responded that it is willing to arbitrate all issues concerning wage rules and working conditions but not the scope issue.

MR. GARTNER: Would you mark this.

(Plaintiff's Exhibit 4 marked for identification.)

THE COURT: Was that the only issue the company said they were not prepared to arbitrate?

THE WITNESS: Yes, sir.

Q I show you Plaintiff's Exhibit 4. Is that the response which the company sent to the Mediation Board?

A That is correct.

MR. GARTNER: I offer it in evidence.

MR. ENGELHARD: No objection.

(Plaintiff's Exhibit 4 received in evidence.)

Q Do you know what the union's response to the proffer of arbitration was?

A The union rejected the proffer of arbitration.

Q Following that, did the company receive a further communication from the Mediation Board?

A Yes. The Board sent a teletype message suggesting that the parties --

Q I am sorry, if I may interrupt, before that. I am talking about any communication with respect to the proffer of arbitration and its rejection by the union and acceptance by the company.

A Yes. Because the union rejected the proffer of arbitration, the parties were released from the jurisdiction of the Board.

(Plaintiff's Exhibit 5 marked for identification.)

xx

Q I show you Plaintiff's Exhibit 5, is that the letter from the Mediation Board saying the parties were released from its jurisdiction and that they would be free to resort to self help after 30 days?

A That is correct.

MR. GARTNER: I offer it in evidence, your Honor.

MR. ENGELHARD: I have a copy. No objection.

THE COURT: It is received.

(Plaintiff's Exhibit 5 received in

xx

evidence.)

Q Following that release by the National Mediation Board of the parties from its jurisdiction was there yet another communication received from the Board?

A Yes, a teletype message was sent to both parties, suggesting that they get together on November 14th.

THE COURT: What date?

THE WITNESS: November 14th.

Q I suggest you made a mistake.

A I am sorry, January 14, 1975.

Q Do you have a copy of that communication with you?

A Yes, I have it.

Q May I ask you to take out that communication?

A Yes.

MR. GARTNER: May I have this marked?

(Plaintiff's Exhibit 6 marked for identification.)

MR. GARTNER: I offer it in evidence.

THE COURT: What is it, a teletype?

MR. GARTNER: Yes, from the National Mediation Board, suggesting that the parties get together on January 14th with the assistance of the Board but specifically disclaiming any jurisdiction; that they were simply offering their services in the public interest and if the parties

parties?

A He fir[illegible]y arrived at about 4:00 in the afternoon and met separately with the union.

Q Please don't tell us what happened separately. I know mediators are very careful not to disclose what they say to each party, but when did the parties get together?

A The following day, on the 15th.

Q That was yesterday?

A Yes.

Q At what time?

A We started about 10:30 in the morning.

Q Can you tell us what if anything Mr. Kasume said during the meeting about the union's scope proposal?

A Yes. Mr. Kasume made reference to that, to the company's response on the proffer of arbitration saying we are willing to arbitrate the other issues other than scope and asked Mr. Quick whether the union's position has changed on the subject.

Q Position with respect to what?

A With respect to scope.

Q Was Mr. Kasume talking about arbitration or was he talking about negotiation?

A He was talking about negotiations.

THE COURT: In other words, Mr. Kasumi said that the plaintiff was willing to negotiate on all issues other than scope or arbitrate on all issues.

THE WITNESS: Based on the company's response to the Board, the company is now willing to negotiate with the union on the issues other than scope.

Q Who responded for the union?

A Mr. Quick responded for the union.

Q What did he say?

A His response was a flat no. The union's position is still the same, it has not changed.

Q Did he say anything else about what the union was willing to do?

A Yes, he did say that they are willing to negotiate all the other open issues, proposals during the course of these meetings.

Q Did anybody else for the company ask them anything else with respect to their position on the scope issue?

A Yes. I asked Mr. Quick, I asked him whether I could assume that the union is dropping the scope issue and willing to negotiate the other issues to get an agreement.

Q What did Mr. Quick say?

A He said no, the union is not dropping or withdrawing the scope proposals.

Q Prior to this meeting --

THE COURT: Excuse me, just one question.

Did the parties then continue discussion or did the meeting end?

THE WITNESS: The meeting ended without any discussions on the proposals.

Q Of course as I understand, you were not present that afternoon but had you had word from Mr. Kasumi or anyone else that negotiations continued that afternoon?

A Yes.

MR. ENGELHARD: Objection, your Honor.

THE COURT: Yes, it is hearsay. That is your objection, I would assume?

MR. ENGELHARD: Yes. I will stipulate that negotiations did continue but not as to what Mr. Kasume said because Mr. Kasume lives in New York --

THE COURT: Yes, we recognize that. It could not be received by me for the truth of the matter asserted because there would be no cross examination available.

MR. GARTNER: Let me withdraw the question.

Q Mr. Kuramoto, before the meeting ended in

the morning, was there any discussion about resuming the meeting?

A Yes. We had agreed to resume the meeting at 2:00 o'clock in the afternoon. At that time discussions on the open proposals would be held.

Q But you were not present at 2:00 o'clock being on a plane at that time?

A That is right.

Q Coming to New York?

A That is right.

Q Prior to that meeting on January 15th, had the union in the immediately preceding sessions that it had with the company agreed to discuss all of the open issues which it had indicated it would discuss yesterday?

MR. ENGELHARD: Objection, unless we can determine when.

THE COURT: It is a form objection which I think properly lies and I ask that the question be rephrased.

Q At the last negotiation session which you testified before January 15th, that is, the November 12th and 13th session, had the union said it was willing to discuss all the open proposals which it said yesterday it was willing to discuss?

A No, they did not. Quite the contrary.

Q You say quite the contrary. What did the union representative say about that?

A Whatever the company proposes, they will not discuss unless there is a scope concession.

Q Was any mention made of this lawsuit yesterday?

A Yes. Mr. Quick did mention that he heard the company had filed a court action.

Q Did he say anything else in the statement at the time he made that observation?

A Yes, right after that he mentioned that the union [illegible] willing to spend the time negotiating all of the open issues.

Q What was the sequence of time in respect of that statement and your statement, your question to Mr. Quick as to whether they were dropping the scope clause?

A I believe almost immediately afterwards.

Q Immediately after Mr. Quick said they were now ready to discuss the open proposals, you asked him whether that meant that they were dropping the scope proposal?

A That is correct.

Q And he responded?

A No.

Q Mr. Kuramoto, you said you have read the papers in this action. I take it that includes the affidavit

Q If I may show you a copy and ask you to look at page 6. There is a chart on that page which indicates the companies who are doing various work for Japan Air Lines at named stations.

Can you tell us, Mr. Kuramoto, whether the work which is being done by those companies under contract for JAL, was ever done by direct employees of JAL?

A No, it never was.

Q Those contracts have been in existence for varying lengths of time, I take it, all preceding the current agreement with AIM?

MR. ENGELHARD: Objection.

THE COURT: Sustained.

Q Can you tell us approximately how long those contracts have been in existence, if you know?

A I don't know.

Q Do you know whether, for example, the contract with United Airlines in San Francisco to do the aircraft maintenance and inspection work has been in existence for any particular period of time?

A Yes. I don't know the exact date but ever since we started flying into San Francisco.

Q When was that?

A The date escapes me. Either 1959, '60 or '61.

Q Ever since that time, Japan Air Lines has had a contract with United to do its maintenance and inspection work in San Francisco?

A That is right.

Q What about Los Angeles, do you know how long JAL has been flying into Los Angeles?

A Probably the same length of time as San Francisco.

THE COURT: 1959, '60, '61?

THE WITNESS: Yes.

Q Has it similarly had a contract with United to do that maintenance work at that basis?

A Yes, to my knowledge.

Q Do you know when Japan Air Lines first began flying to New York?

A In 1972.

Q Do you know what arrangements were made at that time for the performance of the aircraft maintenance and inspection work in New York?

A I didn't get the question.

(Record read.)

A Was it done by these companies?

Q Do you know whether it was done by any of these companies or whether Japan Air Lines hired its own employees?

A It was done by these companies.

Q When you say done by these companies, you are referring not only to the aircraft maintenance and inspection work, but to the plant maintenance, the ramp service and the stores and parts work?

A That is correct.

Q And to the companies that are listed in the chart?

A That is correct.

Q Specifically, the aircraft maintenance and inspection work was never in New York, was never done by Japan Air Lines employees?

A No.

Q It was done by United Airlines under contract?

A That is correct.

THE COURT: Since when was that that you commenced service to New York?

THE WITNESS: I said '72 but I don't think that is correct. I am not sure as to the date.

THE COURT: In any event, beginning at whatever time Japan Air Lines began flying into New York, aircraft maintenance inspection was from that beginning time performed by employees of United working under contract.

THE WITNESS: That is correct.

Q Mr. Kuramoto --

A No. I entered the negotiations for that contract at the beginning of the mediation sessions.

Q I may have been confused this morning. Did you say there were negotiations prior to the Section 6 notice that had been served by the IAM?

A No. There were negotiating sessions held after the Section 6 notices were exchanged.

Q You testified there were meetings in November, December of 1973 and January of 1974.

With regard to the first meeting in November of 1973, will you tell us what to the best of your recollection was said by each party present regarding the scope issue?

A The union in explaining their proposals, which of course was done the first session --

Q Please, in answering, would you identify who said what.

A Mr. Ouick, in explaining the union's position on the scope proposals mentioned that what they meant was that they wanted the company to terminate the contracts of the companies that were doing the handling as the chart shows in the papers and replace those contracted-out employees with our own employees.

Q What are you referring to now in front of you?

A This is a copy of all of the papers of the Court.

Q When Mr. Quick explained what the union meant, what if anything was the response on behalf of the employer?

A Mr. Yonemura replied that the company is not obliged to accede to the union's proposal and that the scope issue is not a subject of negotiations. Therefore the company refused to negotiate on that subject.

THE COURT: May I hear that answer again.

(Record read.)

Q What did Mr. Quick respond to that, if anything, or anybody else on behalf of the union?

A Mr. Quick replied that he disagrees with the company and feels that it is a subject that can be negotiated in the negotiations.

Q What other subjects were discussed during this first meeting?

A All of the proposals, the Section 6 reopeners were discussed those few days. Not all the same day.

Q I am talking about November, the first session.

A Well, I don't recollect exactly which proposals were discussed.

Q Isn't it a fact that during the first

negotiation session, both parties went through all of their proposals?

A During the course of the first session, yes.

Q And you were present during the first session?

A Of the '72-73 contract?

Q I am referring now to the current negotiations.

A Yes, I was.

Q And you discussed such things as wages, vacations and sick leave; is that right?

A Yes.

Q And pension fund.

A Yes.

Q You say that the company's response to the scope issue was that they were not obliged to negotiate as to that?

A Well, we were not required to discuss that issue.

Q Did you state that you will not discuss that issue during that first session?

A I can't recollect the exact statement of the company.

Q Isn't it a fact, Mr. Kuramoto, that the company was willing to discuss the scope issue, whether or not it was obliged to?

A We explained the company's position on the scope

issue.

Q I understand that, but didn't you or other representatives of the company --

THE COURT: Who explained the company's position?

THE WITNESS: Mr. Yonemura say?

THE WITNESS: I don't know exactly the words, but to the effect the scope issue is not an item, a bargainable issue.

Q When did you hear that phrase, "bargainable issue" for the first time?

A During those sessions.

Q Let me repeat the question.

Did Mr. Yonemura state that he would not discuss the scope issue?

A I don't recollect whether he used those terms, but we explained that we were not obliged or obligated or forced to bargain on the scope issue.

Q Let's go to December.

You said there was a meeting, another meeting in December, 1973. Were you present at that meeting?

A Yes, I was.

Q Will you tell us what if anything was said regarding scope at that meeting and tell us who the people were that spoke of each party?

A To my recollection, Mr. Quick repeated the same statement and asked whether the company's position has changed from the previous on the scope issue.

Q What was the response if anything by the company?

A Mr. Yonemura replied that the company's position has not changed.

Q Let me go back for a minute. In the November 1973 negotiating session, can you tell us how long the parties met together?

A In November?

Q Yes, approximately how many hours?

A I believe it was schedule for two or three days.

Q All told during those several days, can you tell us approximately how many hours you spent together?

THE COURT: Talking.

A I would say about ten to twelve hours.

Q You said you met on two or three days during that first session in November. Was it at the first meeting of that session that the scope issue came up?

A Yes.

Q How many hours, if you recall, did you negotiate that particular day, that first day?

A We did not discuss at length the issue, just the response from the company as to their position on the

discuss proposals?

A There were some other nonrelated topics of discussion but I don't recollect what they were.

Q Were the discussions all oral?

A Yes.

Q Isn't it a fact that at the last negotiating session, the fourth, that both sides exchanged written responses and counterproposals? Do you recall that?

A Yes.

THE COURT: Just so I am clear, that would have been on the 12th and 13th of November, 1974, is that what you are talking about?

MR. ENGELHARD: No, your Honor. In the affidavit of Mr. Kasumi, he refers to first negotiation session which in fact was more than one session. It was comprised of several days, so that the last session, the fourth negotiation session according to that affidavit took place during the course of several days in January, 1974.

THE COURT: I see where you are.

Q Subsequent to the last negotiation session, you testified that there was a request for mediation and that you first had a mediation session in June of 1974?

A That is correct.

Q Can you tell us what discussion if any related to the scope issue?

A We went through --

Q Identify the parties, if you will.

A Both Mr. Quick and Mr. Yonemura explained or went through --

Q What did Mr. Quick --

A Mr. Quick went through the union's reopeners and after that, Mr. Yonemura went through the company's reopeners.

Q I am referring now to the scope issue.

A In the course of going through the proposals, the scope issue was also discussed briefly.

THE COURT: What was individual?

THE WITNESS: Basically the same things after negotiations. The union asked whether the company's position on the scope issue has changed and the company's response was, no it had not.

Q How much time did you spend discussing the scope issue?

A Not more than ten, fifteen minutes.

Q Didn't the parties discuss why the company, for example, felt it was not obliged to negotiate this?

A Yes, there were discussions on that.

Q What did the company say and who said it?

A Mr. Yonemura explained that the determination of whether to establish our own employees at the stations that the union is requesting management's right and after the company decides to implement their own employees at these stations, then the company would negotiate wages, rules and working conditions.

Q What did Mr. Quick say, or any other representative of the union?

A Mr. Quick replied that according to the scope provisions in the agreement, that the company is obliged to establish its own employees at each station.

THE COURT: What did he refer to? Did he say any more?

THE WITNESS: He referred to the specific paragraphs in Article 1 of the agreement.

THE COURT: Do we have that before us?

MR. ENGELHARD: I am going to introduce that, your Honor.

May I have this marked as Defendants' Exhibit A for identification.

(Defendants' Exhibit A marked for identification.)

xx

THE COURT: No. I think you are misstating the fact. I have a note if it is worth anything that it was not August. The second session was when?

THE WITNESS: July 20th through August 3rd.

THE COURT: That was my understanding, that it began in July.

Q During the second mediation session July 20th to August 3rd that is when Mr. Phipps was present?

A Yes.

Q Was there any discussion then regarding or relating to the scope issue?

A Yes, there was.

Q Was that brought up as all the other open items were brought up?

A Would you repeat that, I didn't get the question.

Q Was the scope item brought up in negotiations or during mediation as were the other open proposals?

A Yes, it was.

Q What was said by the representatives of the union and representatives of the company relating to that issue?

A Mr. Quick explained when this contract, the present contract was being negotiated, the union had withdrawn the scope issue and had taken the tenative agreement back

for ratification and it was passed.

However, the membership advised him that during the next negotiation sessions, they will not take back another package or ratify another package without any scope concessions in it.

THE COURT: Let me hear that answer again.

(Record read.)

Q Mr. Kuramoto, is it necessary that you refer to these court papers in testifying? Do you have independent recollection of what you are testifying to?

A Well, it helps my recollection if I can refer to this.

MR. ENGELHARD: If your Honor please, I prefer he testify without the use of those court papers until such time as he does not have recollection.

THE COURT: Yes, that is the usual procedure.

Mr. Kuramoto, if you would just hand the papers to your counsel. I will tell you this, no one in our courts is expected to remember everything every time, every place, every date, every name, every event. You testify to the best of your recollection. At such time as you can't recall any more than you have testified to, you can say to counsel, I have no further recollection. Then counsel has two choices. He can move on to another subject

the work and that you are lucky you are doing the work you are doing now and that if the company wanted to, they could lay off all the people now? Isn't that what he said?

A No.

Q Isn't it a fact that even as last as the last mediation session, November 13, that the company was willing to discuss the scope issue with the union?

A No.

Q Isn't it a fact even in December of 1974 the company was willing to discuss the scope issue with the union?

A No.

THE COURT: Was there ever a time when the company was willing to discuss the scope issue with the union?

THE WITNESS: You mean actively sit down and negotiate the opening of these new facilities?

Q The scope issue as proposed?

A No.

Q Didn't the company say that they would still sit down with the union to discuss resolution of that issue in December?

A No.

MR. ENGELHARD: May I see Plaintiff's Exhibit 4, please.

of the company's positions regarding the negotiations?

MR. GARTNER: Objection.

THE COURT: It does call for a conclusion. I assume that is the nature of the objection.

MR. GARTNER: Yes.

THE COURT: Kept abreast of?

A Yes.

THE COURT: I will let it stand.

Q On January 15, yesterday, you actually met in negotiations with the union?

A Yes.

Q In addition to discussion regarding scope, can you tell us what was discussed?

MR. GARTNER: Objection. The form of the question seems to be contrary to the evidence.

THE COURT: I do not have the same recollection of the evidence counsel does and I will ask him to go back one question if he wishes to cover that matter.

MR. ENGELHARD: I will withdraw the question.

Q On January 14 of 1975, did you meet, you and representatives from the company meet with representatives of the union regarding the negotiations?

A No.

Q Did you meet on the 15th, yesterday?

A Yes.

Q What time did the negotiations begin?

A 10:30.

Q Can you tell us what if anything was said specifically with regard to scope?

A I asked Mr. Quick whether the union is willing to negotiate the other proposals and if they are dropping the scope proposal.

THE COURT: What did Mr. Quick say?

THE WITNESS: His reply was, "No."

Q Just, "No"?

A Yes.

THE COURT: Did you ask one question, were they willing to negotiate and were they dropping the scope issue or did you ask the question in two questions?

THE WITNESS: Before that Mr. Quick went through his questioning again and made reference to Articles C and D of scope, paragraphs C and D and restated the proposal and asked whether the company's position has changed.

Q In other words, he tried to negotiate or amend an existing provision of the contract?

MR. GARTNER: Objection.

THE COURT: Sustained. What he tried to do would not be within this witness' province.

Q Mr. Kuramoto, if the clause which the union sought were to be accepted by the company, would that change the provisions of Article 1, Section C and D of the present agreement?

A Yes, it would.

Q How much time yesterday was spent at the negotiation session in the morning?

A One hour.

Q What if anything addition to the scope clause was discussed?

A The union asked for a better wage offer.

Q Was there any discussion regarding proposals other than wages yesterday morning?

A No.

Q And there was agreement to meet in the afternoon, to discuss proposals, isn't that so?

A Yes.

Q Was there any restriction stated by the union or by the company yesterday morning as to what proposals would be discussed in the afternoon?

A No.

Q Do you know, if you know, whether it was the intention as of yesterday when you were present to continue negotiations through today, the 16th?

REDIRECT EXAMINATION

BY MR. GARTNER:

Q Mr. Kuramoto, directing your attention to the fourth mediation session which took place November 12 and 13, 1974, could you tell us in summary outline just how those meetings progressed, that is, what the company people said and what the union people responded if anything without going into great detail. In other words, were their topics mentioned, were their offers made and so on?

A Throughout the meetings, of course the company wanted to have an agreement. The company accepted some of the union's proposals and made counter-proposals on benefits and work rules.

Q Approximately how many proposals did the company make?

A In total, there were ten proposals.

Q Did the union make any proposals at these two meetings at those two sessions?

A No.

Q As the company made each proposal of these ten, did the union respond to those proposals?

A No, there was no response.

Q When the company had finished seriatim one after the other giving its ten proposals, did anybody from the

union say anything at that time?

A Mr. Quick responded to our proposals by saying that no matter what proposals the company makes, unless there is a scope proposal, then they will not have an agreement.

Q Did he indicate in any way what the outcome would be if there was a scope concession or scope proposal?

A Yes. He did mention if the company will agree to the union's scope proposal, then the other proposals would all fall into place.

THE COURT: Did Mr. Quick say that or did Mr. Ogoshi say that or did both of them say that?

THE WITNESS: Mr. Quick said that.

Q In the course of your testimony you have said, for example, in the first negotiation session, all the proposals were discussed.

What do you mean by the word "discussed?"

A It was briefly explained by both sides as to what the proposal is all about so there would not be any misunderstandings.

Q That is the customary way of beginning negotiations?

A That is correct.

Q Everyone goes through his own proposals and explain what they mean?

A Yes.

Q Again, when you say you testified that the first mediation session Mr. Quick went through all of their proposals and Mr. Kasumi went through all of the company's proposals, was that the same kind of discussion?

A Yes.

Q In the fourth mediation session after Mr. Quick had taken the position that he had, was any statement made by any of the union representatives to the mediator?

A Yes. Mr. Quick did say to the mediator that he does not understand why these sessions are still continuing and why are they meeting because --

MR. ENGELHARD: I will object. This is completely beyond the scope of cross examination. It wasn't brought up during the course of direct examination.

MR. GARTNER: On the contrary, your Honor --

THE COURT: Overruled.

Q Would you please continue.

A Mr. Quick quite strongly said to the mediator, since the company is not willing to discuss the scope issue, that there is no reason for continuing these mediations, that it should be cut off.

MR. GARTNER: I have no other questions.

THE COURT: Same ruling.

(Plaintiff's Exhibit 10 received in evidence)

xxx

THE COURT: Mr. Chen, does this reflect equipment required and costs based on Japan Air Lines present traffic?

THE WITNESS: Yes.

THE COURT: Or is this projected for future increases in traffic?

THE WITNESS: I think --

THE COURT: Do you know?

THE WITNESS: The 1975 schedule.

THE COURT: Based onthe 1975 schedule, not projected to '76, '77?

THE WITNESS: No.

Q Referring, Mr. Chen --

THE COURT: May I see 10, please.

Q Showing you Plaintiff's Exhibits 8 and 10, I ask you whether based upon the financial information which you received with respect to that equipment listed in those two documents, did you make an estimate of the cost of these items?

A Yes, I did.

Q What is the total estimated cost for these

items?

A I think --

Q Look at the exhibits.

A For Exhibit 8 --

Q Equipment for aircraft maintenance.

A For Exhibit 8, aircraft maintenance, about $1 million.

Q And for ramp handling, equipment for ramp handling?

A About $1 million.

Q For a total of $2 million for Exhibits 8 and 10?

A Yes.

Q And of course the estimated cost for Exhibit 9 is on the document?

A Yes.

MR. GARTNER: I have no other questions of Mr. Chen.

CROSS EXAMINATION

XXXX BY MR. ENGELHARD:

Q Mr. Chen, referring to Plaintiff's Exhibit No. 9, the estimated cost for office space is $2,194,000?

A Yes.

Q Is that for leased space or is that for

constructing space?

A Constructing space.

MR. GARTNER: May I give the witness Exhibit 9?

MR. ENGELHARD: Sure.

Q Do you have any office space in Anchorage or New York, Los Angeles or San Francisco?

A Yes, we do but we asked each base. They said no space available at this moment. So if we want to own, we need to build some facility.

Q IF you will pardon me, I am having a little difficulty --

MR. GARTNER: If I may translate, as I understood what the witness has said, there are no facilities available for least at these stations so if we want to have the necessary space,we have to lease ground and build facilities.

THE COURT: Where would you have to do that?

THE WITNESS: Each station.

THE COURT: And that includes what places?

THE WITNESS: Anchorage, New York, Los Angeles and San Francisco.

Q Of course, Mr. Chen, with regard to the equipment that is necessary which is set forth or described in

Plaintiff's Exhibits 8 and 9 --

MR. GARTNER: 8 and 10.

MR. ENGELHARD: Excuse me.

Q (Continuing)

Your testimony is that each one would require approximately $1 million?

A Yes, sir.

Q That is purchase outright?

A Yes.

Q Not leased?

A Not leased.

Q Mr. Chen, would you tell us what Japan Air Lines is presently paying United Airlines Airway Equipment Rental Company; Allied Aviation Service; Flying Tiger Lines; Mercury Service; Pan American World Airlines; Air Research Aviation Service Company and Servair for the functions they perform?

MR. GARTNER: Objection. It is confidential information and irrelevant.

THE COURT: I am sorry, you have opened a door and I fear that I must let counsel elicit an answer kept if you determine that you wish to withdraw this evidence. If you do that because of a business reason, I would permit it, but it would seem somewhat unfair to the Court to have

you put in a mass of figures as to the tremendous cost to the airline of this if, for example, the comparable cost you are now paying would be the same.

I will hear you but my first reaction is, if I permit you to introduce thismaterial, I have great difficulty in permitting you to assert some kind of a privilege of confidentiality.

I know of no such privilege, incidently, but I am prepared to hear you.

MR. GARTNER: Your Honor, I start out by suggesting to your Honor since it is our position that we d o not have to bargain on this issue, obviously this is the kind of material which we are not required to give to the union or across the bargaining table, but beyond that, this is what counsel is trying to do here. He is trying to compare apples and oranges.

What we may be paying these various companies for their services has nothing to do with what it would cost us to institute those services ourselves.

The reason that United Airlines, for example, is able to provide these services to us is that they have the building, they have their capital tied up in a building, they have their capital tied up in equipment and they are simply selling to us services which are being performed in

those hangers and in those buildings and with that equipment, but we cannot provide the same services that United Airlines is providing unless we have the same facilities that United Airlines is providing and it is not proper for the union to say to us it doesn't make any difference what your wishes are as to tying up your capital in a building which may cost $2 million or $3-1/2 million if you are paying what -- there is one thing you can be sure of.

We are certainly not paying $3,600,000 every year or every quarter or whatever the contract calls for. We are not paying the full cost of the facilities which United uses not only to service us but to service themselves and it is completely improper for the union to say, we would like to know what you are paying United.

Let's assume you are paying United $300,000 a year for the services that they render you out of facilities that cost $3 million.

Well, in ten years it will cost you the same amount therefore we think you ought to lay out $3 million this year. They have no right to know that information.

THE COURT: Mr. Engelhard?

MR. ENGELHARD: On the contrary. The thrust of the Plaintiff's complaint relating to bargainability of

this scope issue relates to its having to spend large sums of money, capital improvements, if you will, and it seems to me from my previous objection that was made when these exhibits were first offered, that it is significant to know what the cost is, the real cost.

If the plaintiff in this case can hide and secret what their present costs are, the Court does not have any basis to weigh whether or not this is a legitimate defense to a claim that this is not bargainable.

end t

Last take follows Jackie

THE COURT: Mr. Gartner, I will give you a choice. Either you will withdraw your offer or I will require an answer to be furnished.

MR. GARTNER: I don't think that is proper. The Supreme Court in the Fibreboard case has said it is proper to consider what the cost of doing the work would be in terms of capital investment, but they have never said that the union is entitled to compare the cost of buying services with the cost of capital investment. They are two entirely different things.

THE COURT: If I am wrong, I am wrong. I think it is fair. I have given you what I think is substantial latitude to present a picture of a very serious economic consequence visited on your client if they would have to follow the union suggestions or requests or promises.

For me to inhibit cross examination at this point in the manner you suggest, on your argument that these are "trade secrets," I think that is what they really boil down to, that is the only type of privilege I can see to be inappropriate.

So I give you a choice. If you don't like it, I don't know that I could do much about it. If I deny your injunction, you could take this as well as everything else up on appeal.

MR. GARTNER: I have only one other thing to say. That is that it is apparent that the cost of the contracts of these various companies is largely labor cost, and obviously there is an element in there of the value of the facilities which are dedicated, as those companies dedicate to provide those services and the comparison that can be made is simply not a valid comparison.

THE COURT: It may not be. I am not sure how valid the statistics that you have given me are either, but you have given them to me with the idea that I should rely upon them, and I must suggest that I am disturbed about the fairness of permitting you to put in these figures of very substantial costs and then to argue that I cannot permit, or should not permit, a cross examination which would develop the present costs so I could have some standard between present cost and proposed costs.

MR. GARTNER: Your Honor, the proposed costs are only for equipment and buildings. The proposed costs do not include labor costs. We haven't made any offer of the labor cost. That has to be added on top of this.

THE WITNESS: Yes, I think so.

MR. GARTNER: You have to add the cost of the direct labor, the 235 employees that they want us to employ, and the fringe benefits and everything else. We are not

offering that because that would not be proffered as a comparison.

THE COURT: In other words, all you are paying for now are labor costs; you are not paying any of these items?

MR. GARTNER: We are not paying any of these items. We are paying labor service charges to these companies. We haven't offered any evidence on what the labor cost of hiring 235 people would be.

THE COURT: And you don't intend to?

MR. GARTNER: We don't intend to.

MR. ENGELHARD: Your Honor, we don't know on what basis the charges are made by United Air Lines and the other parties. We have no knowledge of it, and it seems to me whatever the cost is, and I don't think Fibreboard goes quite as far as Mr. Gartner suggests, certainly with regard to labor costs as opposed to capital costs, I think we are entitled to proceed and have this developed.

THE COURT: I have Fibreboard in front of me, 379 US 203.

I don't think Fibreboard Paper Products Corp. v. NLRB goes as far as you propose it to go here, 379 US 203, 1964.

Am I looking at the same decision you were

thinking of?

MR. GARTNER: I am looking at a quotation from Mr. Justice Stewart's dissenting opinion: "Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, although the effect of the decision may be necessarily to terminate employment."

THE COURT: Then it goes on: "If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic discretion of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area."

MR. GARTNER: I suggest this to your Honor very seriously and I would offer to brief this further if your Honor has any further doubts after my statement.

If we are not obliged to bargain about this, as Fibreboard indicates, if we are not obliged to give this information to the union across the bargaining table, and if in order to justify our refusal to bargain, if it would be a capital expenditure on our part, we don't have to bargain about it and give the information in labor relations to the union but we have to give it to them in the courtroom.

THE COURT: I think you misapprehend my thinking and I would like to make it clear.

The issue of whether or not this is a bargainable issue in my judgment should be presented to this Court based on factors, not figures. You have gone in with figures at this point.

MR. GARTNER: Then I withdraw the figures.

THE COURT: I would suggest that would be proper and I think what the argument should be based upon is the factors which go to bargainability, which you both can then argue.

MR. GARTNER: I withdraw the figures.

THE COURT: Is there anything else you wish to ask the witness, Mr. Engelhard?

The figures will not be considered by the Court.

Do you have any other questions of the witness?

MR. ENGELHARD: No, your Honor.

THE COURT: Mr. Gartner?

MR. GARTNER: No.

THE COURT: Thank you.

(Witness excused)

THE COURT: At this point, gentlemen, I would say as follows:

Decision reserved. I would suggest that all

post-hearing affidavits and briefs be served and filed with the Court at my chambers by Tuesday, January 21, 1975 at five p.m.

I don't think I can make it any later than that, in all fairness to the Court in rendering a decision, and to make it earlier will obviously make life more difficult for the parties.

MR. ENGELHARD: If your Honor please, just for clarification with regard to affidavits, as I argued this morning, I did not have, I believe, adequate time to have witnesses present. Will your Honor accept affidavits from individuals who have firsthand knowledge who we would have presented had we had the opportunity to get them here in court, or will you accept affidavits from these individuals?

THE COURT: Yes, I will. What my problem will be, and you know what it will be, is that if you put in affidavits, he will want to respond.

Can you get your affidavits in any earlier?

MR. ENGELHARD: When I go back to the office now, I am going to put calls in to try to get the people to come to New York so I could get these affidavits. It's late Thursday. Tomorrow or Saturday or Sunday we will have met with these people and I will make every effort.

THE COURT: If you could get them served on him

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by Monday at five, then I could adhere to the schedule of him getting them to me by Tuesday at five.

The only other thing that I could suggest is, if both of you need more time, you might be willing to extend the January 23rd deadline so I would have three days between the time I get your last paper and the time you indicate will be the strike date. That is the other alternative.

I am not asking you to do that. But if it becomes impossible to meet this schedule, defendants, all affidavits to be served, try to get them down to me as soon -s you can, but served on Mr. Gartner by January 20th, which is Monday, at five o'clock.

Plaintiff's affidavits served down to me also by January 21st at five p.m., and any and all additional briefs, however you do this, because -- the facts and the law separate, possibly, but any and all additional briefs by January 21st at five p.m.

If you can adhere to the schedule I have set for an opening brief by the 20th at five and a reply, if any, by the 21st at five, I think that would be more --

MR. ENGELHARD: That I will have a little difficulty with.

THE COURT: I am giving you a little more

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latitude on the briefs.

If you find you cannot meet this schedule, if you are willing to stipulate to leave the matter in status quo, i.e. no strike and just give me three days before your last submission to this Court and the date of the strike, I will extend your time as you gentlemen agree. Assuming no agreement, thsi will be the schedule.

MR. ENGELHARD: Obviously, if there is an agreement, I will discuss it with Mr. Gartner and communicate with the Court.

THE COURT: I would appreciate that.

Thank you, gentlemen.

I want to comment to counsel on both sides that I consider that you made a very able presentation, both on the direct presentation and the cross examination, particularly in view of the very short notice which all concerned had in this case.

Thank you, gentlemen.

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Japan Air Lines, Co., Ltd.

v. 75 Civ. 166

International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) et al.

New York, January 22, 1975
4:30 p.m.

- - -

(Hearing resumed.)

- - -

Present:

Murray Gartner, Esq.
Edward Brill, Esq.

Sheldon Engelhard, Esq.
Robert Jauvtis, Esq.

- - -

THE COURT: Miss Cruger, would you call the case which was set for this afternoon?

THE CLERK: Japan Air Lines, Co., Ltd. v. International Association of Machinists and Aerospace Workers.

Plaintiff ready?

MR. GARTNER: Yes.

THE CLERK: Is the defendant ready.

MR. ENGELHARD: Yes.

THE COURT: Very well, each of you will have a total of 20 minutes to argue.

You may proceed, Mr. Gartner.

If you want to reserve five minutes for reply, you may.

MR. GARTNER: Your Honor, I would like at this time to ask for a temporary restraining order on the assumption that your Honor has not had time to consider all of the papers that have been filed in this matter.

I would like --

THE COURT: I would suggest that since some of the papers were filed today, and until 15 minutes ago I was engaged in an extensive criminal conspiracy case, which will resume again tomorrow morning at 9:30, your assumption that I have not thoroughly studied the papers is correct.

MR. GARTNER: Oh, yes. I certainly am fully aware of your Honor's more than full schedule, and I did not expect that you would have had time to see all of the final papers that were filed.

I know your Honor made every effort to have the defendant's file their papers earlier, if they could. It turned out that they could not, and therefore, of course, we had no alternative but to file our papers when we did.

I don't think there is any question that the Court

has power to issue a temporary restraining order at this time --

THE COURT: Well, unless I determine that I did not have jurisdiction at the first instance, in that event it would be improvident of me to issue even a temporary restraining order.

MR. GARTNER: Even addressing myself to that question, although I had not thought that there was any seriously urged question of jurisdiction in this case, even on that question I think the United Mine Workers case makes it clear that you --

THE COURT: You mean Gibbs? Which one?

MR. GARTNER: I think United Mine Workers against Lewis.

THE COURT: John L. Lewis?

MR. GARTNER: John L. Lewis, makes it clear that in order to determine the question of jurisdiction, your Honor has jurisdiction to issue a temporary restraining order; so that if there is any serious urging of lack of jurisdiction, and if an argument is now made along those lines, although no such argument has been made up until now, then it seems to me that your Honor should at least issue a temporary restraining order so that you can consider that question of jurisdiction.

But I do not believe that there is any question of jurisdiction in this case.

We have alleged that the defendants are and have been engaged in a violation ofthe requirements of the Railway Labor Act, particularly Section 2 First, which imposes the obligation on both employer and employees in a major dispute situation to exert every reasonable effort to reach an agreement with respect to rates of pay, rules and working conditions.

As we have argued to the Court in the briefs and in other papers that we have filed, it seems very clear on the evidence -- and I must say that in large part the evidence is uncontradicted -- and insofar as the evidence is contradicted by affidavits, I think that the contradiction has been refuted by defendant's own document, and I am referring specifically to Mr. Ogoshi's letter to his general vice president in which he said on October 22, 1974 that the Union knew very emphatically that the company would not bargain on the scope demand.

Now, on the evidence it seems to me clear that the union has been insisting upon a condition of the agreement which they are supposed to be negotiating, which is not within the purview of the representation powers that are given to the union by the statute.

Their brief, if you will, their authority under the statute is to represent employees and to get terms and conditions of employment or rates of pay, rules and working conditions for them to the best of their ability, and they are enjoined by the statute to make any reasonable effort to reach an agreement for those subjects.

Now, we submit, your Honor, that it is very clear that it is not making a reasonable effort to reach an agreement on those subjects, when the union is insisting on interfering with the business that they are bargaining with. They are insisting that we must hire 235 new people that we don't want to hire. That is a decision as to the scope of the enterprise, as to the way in which we will dedicate our capital, as to the activities in which the business will be engaged.

There is nothing in this statute or in the NLRA or LMRA or in any other labor governing statute which permits a union to insist on getting involved in discussion and decision with respect to how the company will run its business.

THE COURT: You have argued all of this in your papers. I am familiar enough with these arguments that you should not repeat them now.

I think what you should do is bring me up todate

on developments to cause me to conclude that it is imperative that the Court today issue a temporary restraining order.

MR. GARTNER: All right, your Honor, I think that is a very proper and appropriate request.

As I am informed as of now, there is no prospect of any agreement being reached tonight. The union is still adamantly insisting upon its so-called scope demand. The parties --

THE COURT: Has any progress been made toward resolving those other disputes of which I was told last week?

MR. GARTNER: The union has withdrawn a number of what must be called very relatively minor issues which any union normally puts in at the beginning of its opening proposals so that it may at some point pretend to be giving up something when it is really not expecting to get it in the first place.

But the critical point is that there is no closure of the distance on questions of wages or pension or insurance.

As we indicated in our papers, your Honor, rather than closure the gap is widening, and I must say that it did not take very much prescience to predict that that is

exactly what would have happened as soon as we brought this lawsuit. That is, if the union began to think that they were in danger of not being able to use the scope issue as a stalking horse, they would prepare themselves for its ultimate withdrawal either by the order of the Court or by themselves at the very last minute by escalating all of the demands, and I think the papers show that the demands have been escalated, and that that, in itself, is bad-faith bargaining and a violation of the Railway Labor Act.

In addition, your Honor, we have had word that the union is preparing for a strike at midnight today. They have, in fact, gone beyond Japan Air Lines and have asked for permission to picket the Port Authorities in the various stations, and I am informed that they have even gone so far as to ask permission to picket United Air Lines as well as Japan Air Lines, because, as your Honor will remember, United Air Lines does a good deal of the work for Japan Air Lines at some of these stations.

So that there is no question in our minds that unless restrained by an order of this Court there will be a strike beginning at midnight, and I would say that it would spread throughout the system as the time zone changes.

THE COURT: Thank you.

MR. GARTNER: Thank you, your Honor.

t2/1 THE COURT: You will have some time to respond, if you want to, but I do not know you are really going to have to.

I will hear now from Mr. Engelhard. You will have a maximum of 20 minutes.

MR. ENGELHARD: Thank you, your Honor.

I am not going to repeat all the arguments which were made in our papers.

THE COURT: Just answer one question.

MR.ENGELHARD: Yes, sir.

THE COURT: Does this Court have jurisdiction?

MR. ENGELHARD: I do not believe you have jurisdiction.

THE COURT: You say you do not believe we do?

MR. ENGELHARD: That is correct.

THE COURT: Would you cite me some authority for that, recent authority. If I have jurisdiction, obviously I have certain obligations.

If I do not, I shouldwalk away from the matter.

Give me recent authority, please.

MR. ENGELHARD: May I have just a moment,your Honor?

THE COURT: Yes.

I would suggest your authority had best be more recent than June 1, 1971.

MR. ENGELHARD: If your Honor please, I do not have the date in 1971 when the United States Supreme Court rendred its decision in Chicgo and Northwestern Railway v. United Transportation Union, although that case was cited recently.

THE COURT: That was June 1, 1971. And it is on that case -- unless you can come up with something more -- and the subsequent decision on Weyman bythe United States Court of Appeals for the Seventh Circuit, decided August 1, 1972, with Certiorari denied by the United States Supreme Court on January 22, 1973 that I am inclined to base the conclusion that this Court would have jurisdiction. Whether or not a preliminary injunction should ultimately issue in this case is something I am going to put aside at the moment. My question goes to jurisdiction.

You recall in that case the District Judge in the first instance dismissed the complaint for want of jurisdiction.

You will recall further the case went to the Supreme Court and was ultimately remanded.

I am sorry, let me correct that just for a moment, and just do it one step at a time.

Going back in order, Chicago and NOrthwestern, the action was brought, the District Judge dismissed the suit, the Court of Appeals affirmed, the Supreme Court reversed and remanded.

On remand, the District Court dismissed the complaint for want of jurisdiction. The railroad filed a notice of appeal to the Seventh Circuit. That court, with Associate Justice Clark sitting, indicated, as I read it, by a reversal and remand of the decision of the District Court, that whatever else may be said there is and was jurisdiction. That is th way I read Chicago and Northwestern Railway in the final analysis.

Whether or not an injunction should issue I think is a separate matter with which I am not going to deal at this moment, but I would ask you, if you feel that I have misstated the thrust of the Chicago and Northwestern Railway case, to indicate to me where I have and what subsequent to the Chicago and Northwestern Railway case would lead you to conclude that this court does not have jurisdiction.

MR. ENGELHARD: I do not have a subsequent citation, your Honor.

THE COURT: I am going to assume, at least for the moment then, that I have read the case properly and that

I have jurisdiction, and I will indicate that in a few moments when, as and if I give you a determination this afternoon on the pending application.

The next question th I would put to you is whether the union would consent not to call a strike for ten days or whether the union insists that a strike should begin at midnight tonight. And the former question would be the union postponing the strike for ten days at the urgent request, not order, of the Court in view of the fact that you gentlemen have presented but I would consider complex legal and factual questions which are impossible of resolution this afternoon.

MR. ENGELHARD: Your Honor, we cannot consent.

THE COURT: All right, you have answered my question. Why not? Why not? What irreparable harm is being done to the union and its members were they to wait for ten days to call a strike on which they have been negotiating for many, many months. What irreparable harm will befall the union if they wait for ten days?

MR.ENGELHARD: If your Honor please, it would appear that their negotiations, their bargaining ability -- their ability,rather, to bargain would be limited. Even during this 10-day period nothing further perhaps would take place, eventhough the parties have been trying to negotiate,

despite the fact that there has been a cooling off period.

The whole concept of the RLA's self help is the anticipation tht there will be a strike because they have been unable -- one party will be unable without the strike to induce the other to enter into a collective bargaining agreement.

THE COURT: That assumes that the parties used reasonable and good faith efforts to bargain within the meaning of the statute, does it not?

MR. ENGELHARD: Yes, that does, your Honor.

THE COURT: Very well. Suppose this Court were to find that that was not the case, would not an injunction lie under those circumstances?

I read the Chicago & Northwestern Railway case as saying if the findings are made and the findings are right there could be an injunction which would not be violative of the Norris-LaGuardia Act.

MR.ENGELHARD: But, if I may interrupt, your Honor --

THE COURT: I finished. You are not interrupting me.

MR. ENGELHARD: I am sorry. I withdraw that.

I call your attention to the words of Justice Harlan when he said --

THE COURT: In a 5 to 4 decision.

MR. ENGELHARD: But majority rules.

THE COURT: That is a different court than the court that sits today -- and I have the highest regard for Justice Harlan whom I consider one of the premier jurists of this century.

MR. ENGELHARD: If I might --

THE COURT: I am familiar with his words, which I assume you refer to, beginning with the third portion of his opinion at page 578 and continuing through page 583. Are these the words you would like me to look at?

MR ENGELHARD: It is in that area, yes.

As a matter of fact, your Honor, they are cited in our memorandum that was furnished to the Court which states that the Court, except under the most urgent circumstances, should not issue an injunction in this type of a labor dispute.

Now, I noted with interest several of the questions which you posed to Mr. Gartner, and I wonder whether or not this is indicative of the question which you are now grappling with, the question of good faith or bad faith.

THE COURT: You see, you both raised the point. You raised it in your papers, which I was reading shortly after they were received, your affidavits in opposition,

so that I have an issue here. I have seen live at least one witness. Obviously I have just the affidavits which you submitted because your people were in California bargaining at the time we held the hearing.

MR.ENGELHARD: One of the questions you posed to Mr. Gartner was, "Well, on the other issues other than scope are the parties bargaining, are you far apart," or words to that effect. And, if you recall -- I am sure you do -- there are two areas which were major areas of contention regarding both wages and pension.

And even Mr. Kuramoto, one of the two live witnesses --

MR.GARTNER: Mr. Chen is live.

MR. ENGELHARD: I said one of the two live witnesses -- who did appear, admitted that during the negotiations they spent a day, and over a day with regard to pension.

Now, that is not a laundry type of a proposal, using the expression of Mr. Gartner in one of his papers, that is something of serious contention and is still on the bargaining table.

THE COURT: Let me suggest this: You have both done a first rate job of presenting the issues, but I fear have not given me sufficient time to resolve them.

Let me take it one step at a time. I think it is fair to say, going back to Justice Harlan's opinion, citing from page 582 -- let me just read and you will see the thrust of my thinking on jurisdiction. Then we will go forward to this pension point.

(Reading): "We find it impossible to say that no set of circumstances could arise where a strike injunction isthe only practical effective means of enforcing the command of Section 2 First. Accordingly, our prior decisions lead us to hold that the Norris-LaGuardia Act does not forbid the District Court from even considering whether this is such a case."

He goes on and says at page 583, after discussing the matter of remedies: "These weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of Section 2 First."

What I have interpreted from this -- and I think the wording is fairly clear -- is, A, that I have jurisdiction, but that I should exercise considerable care before I issue a preliminary injunction.

So having disposed at least in my mind of the question of jurisdiction, I turn to the question of whether there should be a temporary restraining order.

And I ask you what should be the last question in

my interruption which would be, could you state for me the irreparable harm which would befall the union were I to restrain the union for a period of 10, possibly with an extension to no more than 20 days. I must act within that outside time, as you know, under the rules.

I know that the air line, if forced to cease operating, will sustain substantial financial losses which, if they are sustained and are sustained unjustifiably, would have to be collected from the pockets of the union members, or, if that were impossible, would become irreparable.

I don't at the moment, other than that the union is not happy with having to have to defer its intention to call a strike -- which they feel would be effective in causing them to reach an ultimate agreement -- which I am sure is what they want and what the other party wants, as well -- but I don't really see the irreparable harm on the union other than the fact that they can't strike for 10 or 20 days.

Yes, they have had a cooling off period, so basically what I would be doing is extending it. They lived within the cooling off period. I would suggest they could live within the restraint period.

MR. ENGELHARD: If your Honor please, it is very difficult sometimes to define irreparable damage because

certainly, for example, the Japan Air Lines could be made whole in terms of money theoretically at least, assuming there were enough assets to pay the damages, if they did sustain damages, if it was ultimately concluded they were correct in their legal position.

THE COURT: If they operate at a profit and they stop operating, it seems to me they would be sustaining damages if I do reach that conclusion. How much is something that I really have some difficulty in indicating to you at this point, but it would seem to me an active air line which has to stop flying is going to be put in quite a bind.

MR.ENGELHARD: Except, if the contrary is true, if they are not operating at a profit, we are helping to mitigate their losses.

MR. GARTNER: Oh, no.

THE COURT: They wouldn't be so active that they were looking to discontinue their service.

MR.GARTNER: That is an interesting theory, Mr. Engelhard has, that if we were operating at a loss he would be helping us to cause further losses. It is quite contrary.

Even while operating at a loss, we are paying certain basic expenses. If we cannot get any revenues the losses are going to be tremendous.

THE COURT: I suppose there is another argument, too, not only the monetary argument, but that the travelling public would be injured by a reduction in service.

Now, you might argue this is great because if a foreign airline with a heavy Pacific trade is forced to stop operating all these passengers would switch to the empty American airliners which are making the transpacific flight now. I think that if I were to adopt such a protectionist theory I would be reverting back to before the invention of flight.

MR. GARTNER: Your Honor, I must say if you are going to follow that line I would have to get out of this case because we also represent Pan American and TWA. There is a conflict of interest.

THE COURT: I promise I wouldn't interrupt again, Mr. Engelhard. I would like to listen to you.

MR.ENGELHARD: It is too easy to state that the union is not going to suffer irreparable damage. I have seen many times --

THE COURT: State the converse of it, though, show me how it becomes irreparable.

MR. ENGELHARD: I believe this will be indicative. I have seen a number of times during the years I practiced what happens in the case of a delay, be it in

a union election or be it in collective bargaining, when employees both represented and not represented do not know what is happening. Something is happening. A contract has expired. They depend upon the union in this case. They depend upon the protections of the Railway Labor Act. And on that basis they bargain. Does it mean money out of their pockets right now? I couldn't say it does.

Does it mean something in connection with the manner in which the parties will bargain, in the manner in which employees have respect for their negotiators? Yes, it does.

How can it be measured? I can't estimate that, your Honor, but I have seen petitions filed in NLRB cases for decertification, I have seen situations where people have actually called the union in to represent them where cards were filed, where they went out on strike even before a union came into it and because of delays of the National Labor Relations Board came the time of the election and the union lost. I have seen this.

I think there is irreparable damage, your Honor, because the whole concept of bargaining under the Railway Labor Act is being diluted, is being diluted because the 30-day extension is being moved another ten days.

Now, when I appeared before this court on the

16th I mentioned to you the fact, or as an argument the question of laches, and that is significant because the people, the collective bargaining unit for the employees, not the ones at the negotiating table, these people expect that a certain timetable is going to be adhered to. They are told by their people, "We will bargain and we will go back for ratification."

And the people were presented a contract in September. It was voted down by approximately 97 per cent of the people who felt at that time that if there is no agreement reached that come the end of the thirty-day period, if they want to, if it is appropriate or propitious then we will engage in self-help.

THE COURT: Can you put a dollar amount, sir, on your client's prospective injury were I to issue a temporary restraining order today?

MR. ENGELHARD: My associate aptly put it: They don't run a business.

THE COURT: They run a business just like everybody else. They pay salaries, they have expenses.

MR. ENGELHARD: It is not a profit business. They do not go by a profit and loss statement. Out-of-pocket expenses could be thousands, obviously. They have counsel fees, they have two people who had to fly in

over the weekend.

THE COURT: I am not sure that our railroads are running a business today. You talked before about the Railway Labor Act. I supervised one in reorganization, as are most of the other railroads in the Northeast. I think most railroad people would exchange places with most union people, but I am not going to argue that point. Give me a dollar amount which you indicate to me your client would be injured by. If there isn't any, tell me.

MR.ENGELHARD: Your Honor, I can give you a figure and say "20,000 or $50,000,"and if I were asked the next question, "How do you justify that," I couldn't give you an answer. I just think that what the employer has done here has set the stage. They knew what was going to happen and were looking for a temporary restraining order, looking for a preliminary injunction at the end when the union officials have to face the employees and they say, "Why can't we strike if we want to? Why, after all this time, can't we strike?"

THE COURT: Because the case presents complex problems and the Judge is telling them he wants to take a look at it before he lets parties proceed from this point forward. That is why.

If the members of the union are not concerned

with due process I would be surprised. I have union members in here every day sitting as jurors and they are as concerned with due process in this country, as any of us. I would suggest that there are intelligent people who are members of that union. I know they want the best working conditions they can obtain -- and I must suggest I am very sympathetic for their getting them -- but at the same time they must realize, as you must realize, that when a case is presented to a court it is not a question of flipping a coin up in the air and seeing which side the coin comes down on. It is determining the rights of people and nothiqng is clearer to me that this is a complicated case than the material presented by both sides. I have three briefs, very good briefs, substantial affidavits, plus a hearing transcript which is 150 pages.

I suggest that I am not prepared to rule on the application for injunction today. I am sure that doesn't surprise you.

MR. ENGELHARD: I appreciate your answering the question.

THE COURT: The Court is prepared to render a decision on the application which has been presented this afternoon, which is for a temporary restraining order. This is the decision of the Court:

This case presents very complex legal and factual questions which are impossible of speedy resolution in a judicious fashion. Therefore, the requisite findings on which to base the granting or denying of a preliminary injunction cannot be made at this time. The question to be answered at this time is whether a temporary restraining order should issue to allow the Court the time necessary to resolve the issues presented.

The Court knows that Chicago and Northwestern Railway Company versus United Transportation Union, 402 U.S. 570(1971), while decidingthat the "duty to use every reasonable effort ...." embodied in Section 2 First of the Railway Labor Act imposed on the parties a judicially and forcible duty and that the district courts had jurisdiction to enjoin resort to self help in order to enforce the duty established therein. It did so in a most circumscribed fashion; cautioning judicial restraint in issuing strike injunctions.

However, should this Court not issue a temporary order the casepresently before it would in effect become moot. For this reason the Court has concluded that it is imperative to preserve the status quo in order to provide this Court with the appropriate atmosphere in which to weigh the very difficult questions over which the Chicago and

Northwestern case tells us we have jurisdiction.

Accordingly, the application for a temporary restraining order is granted. Counsel are directed to submit an appropriate order and to have the order provide for security as required by Rule 65(c) of the Federal Rules of Civil Procedure in the amount of $50,000.

MR. GARTNER: If your Honor will allow me, I will change the amount which I have put in on this draft.

THE COURT: If you are making it less --

MR. GARTNER: I am making it more. I have put in $10,000, your Honor.

THE COURT: All right.

MR. GARTNER: We have with us a bond in the amount of $10,000, if your Honor will accept that.

THE COURT: I will give you until 5 p.m. tomorrow to file.

MR. GARTNER: An additional bond?

THE COURT: Actually our clerk's office is closed now so it would be difficult for you even to file a $10,000 bond, but I will give you until 5 o'clock tomorrow to file the $50,000 bond.

MR. GARTNER: I would suggest that since we have drafted the order to say, "Upon the plaintiff's giving security in the sum of $10,000, it is hereby ordered"

that perhaps your Honor would allow us to say that giving security in the sum of $10,000 now and an additional bond in the amount of $40,000by 5 p.m.

THE COURT: I can change it to indicate that the bond is to be filed no later than January 23rd at 5 p.m.

MR. GARTNER: All right, your Honor. Thank you.

THE COURT: I will examine the order. I know this has not been seen by Mr. Aponte.

MR. GARTNER: No.

THE COURT: So I am going to take it upon myself to sign it. You indicated that the deadline was midnight tonight.

MR. GARTNER: Midnight tonight.

THE COURT: If you would give a copy to Mr. Engelhard so he can indicate whether there is any matter of form which he wishes to point to --

MR. GARTNER: I have done that, your Honor.

MR. ENGELHARD: If your Honor please, with regard to the provisions on page 3 I think that the entire Section 1 should be deleted.

THE COURT: What are your reasons?

MR. ENGELHARD: Well, your Honor, the parties are now presently meeting. The last I heard they are presently meeting and I think until there is a provision

that scope is non-bargainable -- and I don't think you will find that to be the case --that the union should have an opportunity to still bargainwith regard to that.

THE COURT: I want you to resolve hopefully all other issues. For me to not include that would in my judgment be a self-defeating thing. And if that is the motive of the union, if they plan frankly to utilize this just to cut off negotiations completely, I think it would be indicative to this court of an attitude contrary to what you presented to me, and, frankly, indicative, at least to some extent, of bad faith.

If I should learn in the interim that is what is done -- remember, this is an injunctive matter, a matter of equity, and matters may be brought to my attention in the next ten days. No, I will leave that in.

MR.ENGELHARD: Mr. Kasumi must be present at all negotiations because I was told the chief spokesman was going back to Tokyo.

THE COURT: If you tell me they are not bargaining with a person who does have authority, the knife will cut the other way. I don't know if it has to be Mr. Kasumi, but it has to be a man able to make decisions.

MR.GARTNER: Mr. Kasumi is not going to Tokyo. That is a misreporting of an incident which Mr. Engelhard

was told over the telephone. Mr. Kasumi made a telephone call to Tokyo. That is what that is all about.

THE COURT: All right.

In any event, either of you may in the interim period bring to my attention anything that might cause my views to be swayed relative to what I consider to be good-faith bargaining which I hope sincerely will continue.

MR. ENGELHARD: If your Honor please, I am not so certain during the cooling off period the parties are obligated to meet and negotiate.

THE COURT: As far as this Court is concerned they are, and I would suggest anyone taking a position to the contrary would be very much in error.

MR.GARTNER: There is no question about it, your Honor. The cases say clearly that the duty to exert every reasonable effort to reach agreement continues throughout all the time until the expiration of all the procedures of the Railway Labor Act. And I think I can cite a case to your Honor on that.

THE COURT: No, that is all right.

I am going to extend this until the 31st day of January at 5 o'clock. That is the 9th day, as I calculate it. The 10th day comes on a Saturday. I have put it to the last day of January.

MR. ENGELHARD: Your Honor, may I be heard on that also, please?

THE COURT: Yes.

MR.ENGELHARD: I am not trying to belabor this, but,as I recall, on the very first day of these proceedings there were two or several proposals made in connection with a consent to a temporary restraining order.

THE COURT: Yes.

MR. ENGELHARD: One of those was to go to California, of course, and this was rejected by Mr. Gartner.

THE COURT: You wanted to transfer the case, as I recall it.

MR. ~~GARTNER~~ Engelhard: That is right, your Honor. The next was a proposal would we consent to a TRO here in New York to give us an opportunity to present witnesses so that we would not have to rely on cross examination of Mr. Gartner's witnesses or upon affidavits which we were able to submit subsequently. And I informed the Court at that time that I did not have the authority at that time to consent, but I would attempt to reach out to these people.

And at that time I believe the Court said, "Well, look, we can't have a consent TRO open ended" -- explaining your own calendar and that you suggested a consent to the

end of the month -- approximately, I think, you said ten days. And yet I was put to the proofs.

Now,within that ten-day period we certain could have produced all the witnesses. Now this Court is going to make a decision on testimony of Mr. Gartner that witnesses, plus affidavits, which obviously cannot be complete; otherwise you couldn't reach it between now and the time of the 31st. And I would think under those circumstances we should be given the opportunity to present witnesses to refute the statements of Mr. Kuramoto and refute the statements that are in Mr. Kasumi's affidavit.

THE COURT: When?

MR.ENGELHARD: Your Honor, this Court was willing to extend it to the 31st, but then we would have the opportunity, you said, to present witnesses, or nothing.

THE COURT: You chose to reject the offer.

MR.ENGELHARD: No, your Honor.

THE COURT: Yes, you did.

MR. ENGELHARD: Your Honor, I was not given the opportunity. You said to me -- your Honor, my recollection is that Mr. Gartner would not go with an open-ended date.

MR. GARTNER: On the contrary.

MR. ENGELHARD: Read the transcript. It states so.

MR. GARTNER: It was the Court that was concerned that you should not be subject to an open-ended extension.

MR. ENGELHARD: That is not correct.

MR. GARTNER: Well, that is right. It was not my concern, it was the Court's concern.

MR.ENGELHARD: You wouldn't consent to the 31st.

MR.GARTNER: Of course I would have been delighted to an open-ended restraining order.

MR. ENGELHARD: Your Honor, I would think in this instance the method that the plaintiff has taken in effect deprives us of the right to have witnesses.

THE COURT: If I reach the conclusion after studying the papers within the next ten days that it is in your interest to present live witnesses, I tell you now that I will either schedule a hearing within that time, or, as may be the case -- and you were here when I took a poll of counsel in this multi-party narcotics case -- I may feel that the interests of justice require me to extend this temporary restraining order for no more than an additional 10 days for the sole purpose of conducting an evidentiary hearing.

In other words, if I feel it is appropriate, I may decide this case for you on the papers, on the law.

However, if I feel that it is necessary to resolve a contested issue of fact, I tell you now that I will schedule a hearing where you can produce your people at the earliest date I can give you. I can't do more than that.

Jut to correct Mr. Gartner, I think that the transcript does indicate, Mr. Gartner, at page 24 that you did reject a proposal relative to the matter of witnesses and the like. I won't below the point. It is not a question of who did or who didn't.

MR. GARTNER: Your Honor, of course, I rejected a proposal to go to San Francisco. I made the proposal that they consent to the TRO here in New York with a TRO which would extend only to the end of the month. That was my proposal.

THE COURT: Well, I am not going to go through the transcript now which is 150 pages. In flipping it I saw one rejection, but my memory is not that crystal clear. I would have to be refreshed by the transcript.

However,I would say, as I did a moment ago, that that doesn't change my thinking in the matter. I think that is what is important. At the moment I have determined to put the matter into status quo for a 10-day period. I will study the papers. If I believe the issues are legal in nature, I will resolve them either for or against the

granting of an injunction. If I find that facts are necessary -- I have seen one live witness --

MR. GARTNER: Two.

THE COURT: Well, two, yes.

MR. GARTNER: One and a half.

THE COURT: But if I feel that something like good faith, which may be a contested issue here, has been presented only by partial live testimony, I will make it my business, gentlemen, to schedule an appropriate evidentiary hearing within the outside date from Friday, within 20 days, and I would certainly hope to do it far short of that.

However, as you gentlemen know -- and Mr. Mukasey, who is trying the criminal case has just arrived -- I basically can try only one case at a time. It might be nice if I had him on the day shift and you gentlemen on the night shift, but I must suggest that I think that all I can promise you is to give you the opportunity to present witnesses, Mr. Engelhard.

If I believe there are contested issues of fact which might be resolved against you, if I feel that way I will give you the opportunity to present your witnesses. I will give you some reasonable notice of a couple of days to get them here and we will go forward on that basis.

If I resolve the issues of fact on the papers against Mr. Gartner, he has presented his witnesses live. If I find the only issues I have are issues of law, then obviously I will say so in my decision and we will not need live witnesses.

MR.ENGELHARD: I understand, your Honor.

THE COURT: Is that satisfactory on that score, gentlemen?

MR.GARTNER: Your Honor, I don't think that anybody could ask for anything fairer. I would only suggest this: If your Honor has doubt any factual issue which arose by a contention that was made by the defendants in their papers after the hearing and you have some doubt about the testimony that we have presented by affidavit that I would also like the opportunity to present live witnesses.

THE COURT: Let me suggest this: I am not going to cut you off because in a normal trial the defense proceeds after the plaintiff and then the plaintiff comes back with his rebuttal, so I am not going to cut you off from that and tell you you are not going to have the opportunity because at the moment I don't know what he is going to present. This isn't the usual civil case where we have had all discovery and all the cards are out on the table.

I know this: I have a maximum period of 20 days to keep a TRO alive. Unless you gentlemen consent to an extention beyond that time, as I understand it, it lapses.

MR. ENGELHARD: If your Honor please, I could be in error, but I believe under the Norr-LaGuardia Act a temporary restraining order is going for five days and not the ten days.

MR. GARTNER: The Norris-LaGuardia Act I don't believe applies in this situation, your Honor.

MR.ENGELHARD: This is a labor dispute.

THE COURT: Let me suggest this: If you come up with some law on that, move within the next five days, not tonight, move within the next five days on papers with a memo to dissolve the TRO after five days.

MR. GARTNER: We have had that question many times and I think your Honor --

THE COURT: Why don't you gentlemen discuss that? Right now there is a temporary restraining order as provided in Rule 65 of theFederal Rules of Civil Procedure. You have the right, counsel, on papers to move promptly on an order to show cause to dissolve that at the end of five days. I am not saying that you can't move; you can always move.

Then Mr. Gartner will have a chance to oppose

you and we will proceed on that basis. I am not sufficiently familiar with the law under Norris-LaGuardia to tell you you are right or you are wrong.

Gentlemen, I will hand down the temporary restraining order so that it can be conformed and Mr. Engelhard can give an admission of service to Mr. Gartner.

I wrote a couple of things in there. I want to be sure you each have it.

Is there anything else tonight, gentlemen?

MR. GARTNER: Just one short comment, if I might take your Honor's time. If your Honor has any doubt about jurisdiction, I would call your Honor's attention to the fact that it was the IAM just about a year ago which sued Air France in an attempt to get precisely the preliminary injunction that we are seeking.

MR. ENGELHARD: And we lost.

MR. GARTNER: Only because you didn't bargain in good faith, not because of jurisdiction.

THE COURT: Let me leave this. I asked Mr. Gartner some questions and I asked you some questions. I think you know my thought on jurisdiction. My basic thought from the Chicago and Northwestern case is that I have jurisdiction. You have given me a lot of work today. I will do the best I can with the problem

you presented me with.

The best news would be for you to go back to your respective clients and tell them to please sit down and bargain in good faith and settle their differences.

Thank you.

Good night, gentlemen.

MR. GARTNER: Thank you, your Honor.

MR. ENGELHARD: Thank you, your Honor.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JAPAN AIR LINES, CO., INC., Plaintiff, -against- INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO (IAM) et al., Defendants	75 Civ 166

New York, New York
January 27, 1975--5:00 p.m.

Before:

HONORABLE ROBERT J. WARD,
District Judge

APPEARANCES:

POLETTI, FREIDIN, PRASHKER, FELDMAN & GARTNER, ESQS.,
Attorneys for Plaintiff
BY: MURRAY GARTNER, ESQ., and
EDWARD BRILL, ESQ., of counsel

VLADECK, ELIAS, VLADECK & LEWIS, ESQS.,
Attorneys for Defendants
BY: SHELDON ENGELHARD, ESQ., and
ROBERT JAUVTIS, ESQ., of counsel

B1 THE COURT: We are here this afternoon on an order to show cause to extend a temporary restraining order which was presented to the Court by plaintiff at about 1:30 this afternoon and was made returnable before the Court at 4:15.

Let the record reflect that it is now 5:00 o'clock, the delay occasioned by the fact that the jury in the case which I am trying was here until 4:30, and counsel had a variety of applications which occupied the next half-hour.

Mr. Gartner.

MR. GARTNER: Thank you, your Honor.

We have made this application to extend the temporary restraining order because, as your Honor knows, I believe, the defendants have argued in an order to show casue presented to the Circuit Court of Appeals that the temporary restraining order expired at the end of five days from its issuance because of the provisions of Section 107 of the Norris-LaGuardia Act.

The orde to show cause in the Court of Appeals is not returnable until 10:30 tomorrow morning.

I this morning asked counsel for the defendants if he would stipulate that they would abide by the restraining order until after the appearance in the Court of Appeals

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tomorrow morning.

Counsel returned my call about an hour afterwards and told me that he had consulted with his clients and that he could not stipulate.

Therefore, because we are concerned, that there may be a vacuum between 5:15 tonight and 10:30 tomorrow morning, we have taken the cautionary step -- I don't want to say distasteful -- we have taken the step of coming to this court this late in the day after a long day that we know the Court has had, and we are presenting two propositions simply to the Court.

We do not think that the Norris-LaGuardia Act governs in this situation, and we stated that position at the time the temporary restraining order was issued.

The Court at the time indicated that if counsel for the defendants had some doubt or had some belief that the Norris-LaGuardia Act did apply, that defendants were invited to make a formal motion to the Court supported by authorities before the five days had expired asking the Court to acknowledge that the terms of the Norris LaGuardia Act controlled.

The Court, however, said it was not making any determination at that time as to whether the Norris-LaGuardia Act contolled or not.

Therefore, it seems to us that at this point the Court should address itself to that question, at least to the extent of indicating that it is the Court's present belief that the temporary restraining order was not issued under the terms of the Norris-LaGuardia Act, and that it was issued under Rule 65(b), and therefore was intended to be effective for the period stipulated by Rule 65(b).

That is the first point I would like to present to the Court.

The second point is this, your Honor: If upon examination of the authorities which we have presented to the Court by means of delivering to the Court a copy of the brief which we have filed with the Court of Appeals at noon today, if upon examination of those authorities or any other authorities which defendants may at any time present to this Court, the Court should become convinced that the Norris-LaGuardia Act, indeed, does control this situation, and that the Court is absolutely limited to a period of five days an effective temporary restraining order, then we suggest to the Court that the defendants' patent unwillingness to agree to an extension of time so that the Court can do what the Court indicated it wanted to do, consider this matter in a judicial fashion and render a decision on the motion for preliminary injunction after

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due consideration, giving fair hearing to both sides and giving fair consideration to the applicable law.

If that is the position of the defendants, then, your Honor, we want to call the Court's attention to the established law in the Second Circuit that a preliminary injunction may be issued in cases where the balance of -- and I am quoting from International Controls Corporation against Vesco, 490 F2nd, 1334, 1974, where, I believe it was Judge Friendly -- no, I'm sorry, Judge Kaufman said that where the balance of hardships tips decidedly toward the party requesting the temporary relief, and that party has raised questions going to the merits so serious, substantial and difficult as to make them a fair ground for litigation and thus, for more deliberate investigation, it is proper to issue a preliminary injunction just on that showing.

Now we suggest, your Honor, as your Honor has said at the time the Court issued the temporary restraining order, there are difficult and complex questions in this case, and there is no question on the affidavits and the evidence presented to the Court that the balance of hardships that tips most decisively on the side of the plaintiff in this action.

Those are sufficient grounds under the

established rule of the Second Circuit to issue a preliminary injunction.

If the defendants will not allow this Court to have the time necessary for deliberation because they insist that the Norris-LaGuardia Act applies, and the Court is limited absolutely to a five-day period, and if the Court should reach that same conclusion, which we do not, of course, urge upon the Court, but if the Court should reach that conclusion, then I suggest to your Honor the Court has complete power to issue a preliminary injunction immediately.

THE COURT: Thank you Mr. Gartner.

MR. GARTNER: Thank you, sir.

THE COURT: Mr. Engelhard.

MR. ENGELHARD: If the Court pleases, the Norris-LaGuardia Act, in effect, limited the area of Rule 65 of the Federal Rules of Civil Procedure. They have limited that.

The Norris-LaGuardia Act says that under certain circumstances the Court does have the right to issue a temporary restraining order to be in effect for no more than five days, and thereafter shall be void.

B2 This is quite different than the Federal Rules of Civil Procedure, Rule 65 where under certain circum-

consent to that? I think that that would not be unreasonable. In other words, to agree to extend the TRO but to delete from it the paragraph relating to an injunction from directly or indirectly insisting or demanding that JAL bargain with the IAM over the "scope" matter.

MR. ENGELHARD: Well, if your Honor please, I would like very much to be in that position to say yes or no.

I believe the Court is already informed, if not formally, certainly informally, that there is an appeal pending here to be heard, and/or a motion to vacate the TRO tomorrow in the Second Circuit, and, obviously, I do not want to be in a position or be in an inconsistent position, because as part of the motion to vacate we raise the question of jurisdiction.

Now, I don't want to be in a position of consenting and saying here that the Court does have jurisdiction and at the same time say to the Court you do not have jurisdiction.

THE COURT: Mr. Gartner, would you object if the Court deleted from the temporary restraining order tonight paragraph 1 on page 3?

MR. GARTNER: I would object, your Honor, only becaue I do not think it would have an affect other than,

perhaps, to lead the mistaken notion on the part of the Union Committee that they are now free to bargain on scope.

Certainly JAL has made it clear to them and they know that we won't bargain on it unless we are ordered by the Court to do it, and, therefore, I think that it would be harmful to change the order at this time.

THE COURT: Very well.

MR. GARTNER: I would say one other thing, that leaving it in the order does not change the status quo, because there was no bargaining going on with respect to the scope issue at the time the order was issued. That is clear from the papers.

THE COURT: I raised the question; you both objected, and I am not about to change the matter over your objection because, obviously, by merely changing the matter I am not resolving the differences which bring you here.

The next question which I would address to Mr. Engelhard, because he argues jurisdiction, is whether it is his position that the five-day limitation placed on temporary restraining orders by Section 107 of Title 29 of the United States Code denies the Court the power to continue a restraining order of more than five days, whether it is absolute or it's a matter of the Court having

authority to continue the matter further, because I would remind you that the way the matter has been left at the moment, the hearing, the evidentiary hearing which was begun and as to which two witnesses were heard, has not been completed yet, and under the circumstances I would like to know if it is your desire before the hearing is marked completed to put on witnesses should the Court feel witnesses are necessary or do you withdraw that request?

I had remembered a promise from me to you, Mr. Engelhard, that before I decided a contested factual issue on affidavits, I would afford you an cpportunity to bring in witnesses.

MR. ENGELHARD: Your recollection is absolutely correct, your Honor.

THE COURT: Right.

MR. ENGELHARD: I read it over the weekend again in the transcript.

THE COURT: So tell me now, do you still wish, if that is my disposition that there are issues of fact which I find as I determine the questions which I have before me, whether you do, in fact, wish to present witnesses; or because of this application do you want to have done with it, and do you waive the right that I gave you to produce witnesses?

MR. ENGELHARD: If your Honor please, they are two separate and distinct matters.

B3 THE COURT: No, I don't think they are, because I think I have the right to extend the temporary restraining order even assuming, arguendo, that Norris-LaGuardia applies, I think I have the right to extend the TRO for more than five days to enable me to complete the hearing on the application for an injunction. And as I see this case now, I cannot say to you that the hearing has been completed, and you have not said to me "I waive any right to present live witnesses in connection with the hearing."

MR. ENGELHARD: Your Honor, again I must take the position that while they seem related and certainly arise out of the same set of circumstances -- I am talking now about the TRO and the motion for a preliminary injunction -- they are procedurally distinct.

Now, I cannot obviously be in a position where I am going to say to the Court "I waive my right to present witnesses." We don't believe that the Court has jurisdiction on the first instance. But let's suppose that you, this Court, or the Circuit Court says that, in fact, the Court does have jurisdiction, I don't want, nor can I be in a position, obviously, of saying "I am waiving my right to put on live witnesses."

ment that the scope -- I will have to use that word without quotes -- of the order is such that we, the defendants, are precluded from bargaining as to a very important issue, now the only important issue. In effect what the union is being asked to do in this give and take process is not completely give and take. They cannot do that. Are they to hold back other items which they would otherwise relinquish just because they may have to again bargain on scope?

THE COURT: I am not concerned about presiding at a minuet, sir. I am concerned with parties who have legitimate grievances and resolving them, and it would seem to me that if we hold the matter of scope to the side, the parties have a better chance of resolving the rest of their grievances.

If you were to say to me, let's have scope in there as well and we could well get rid of this whole labor mess, that would be another story. But you have not said that and your adversary, I must say, has not either.

So, therefore, I am prepared to rule.

Basing my decision in part upon Toledo P&W RR vs Brotherhood of Railroad Trainmen, Enterprise Lodge No.27, 132 F2nd, 265(Seventh Circuit 1943, reversed on other grounds) 321 US50(1944), I am of the view that I do have the right to extend the limitation which counsel indicates to be

five days beyond five days just as long as I do not do it for any excessive period.

In Pan American World Airways vs Flight Engineers International Association, 306 F2nd 840(Second Circuit, 1962), the Court of Appeals appeared to indicate at page 842, at least to my interpretation of their decision, that an extension was possible although not far beyond the limits prescribed by Rule 65(b).

B4 Accordingly, in the Court's opinion whether or not the Norris-LaGuardia Act applies, I advised counsel that it was the Court's intention to continue the temporary restraining order whether ab initio or by extension up to and including January 31st, 1975 at 5:00 p.m.

I would suggest that until the temporary restraining order, which I issued last week, is dissolved by order of this Court, or by order of the United States Court of Appeals for the Second Circuit, or taking the matter all the way, by the United States Supreme Court, it is in force and effect.

I believe the order to be legal and binding. In the unlikely event the order is found to have been issued without jurisdiction, I would still suggest that those who violate it, violate it at their peril and that the proper order would be for either this Court or a higher Court to

dissolve the order.

I do not know that anything further is necessary. I think that I have made myself very clear to you, gentlemen. And I would suggest that before anyone proceeds in violation of the terms of the order as I find it they should obtain a modification. And I say since you are before the United States Court of Appeals for the Second Circuit tomorrow I suggest that you may apply in the first instance to that Court.

In the event that that Court determines that it is without jurisdiction to hear an appeal from my granting of the temporary restraining order, I continue to indicate to you that you are free to come back to me and make whatever applications you deem appropriate. However, it is my position that up to this moment and up to January 31st, 1975 at 5:00 p.m. my prior order is in effect and will remain in effect unless and until it is dissolved either by the Court of Appeals, the Supreme Court or by this Court.

Is that clear, gentlemen?

MR. GARTNER: Yes, your Honor. Thank you very much. I am sorry it was necessary to trouble you.

* * * *

MR. ENGELHARD: If your Honor please, then we have not had the hearing that we are entitled to.

THE COURT: And I want to give to you. I think I am in this position. I tell you now that I am prepared to give you a full and complete hearing of the type you say you are entitled to beginning Monday morning at 9:30 a.m. here and continuing from day-to-day until completed.

That I am prepared to do right here and now. If you want. I am ready to go with you and give you everything beginning on Monday next.

MR. ENGELHARD: If your Honor please, can we finish with the temporary restraining order between now and the day we meet?

THE COURT: But let me ask you something.

If I don't extend the temporary restraining order, which I would suggest I would permit you at the close of the hearing to move again to vacate or dissolve, I am not saying it is going to be writ in stone. I want to extend it now once. I will let you at the conclusion of the evidence say, "Judge, this is what I have demonstrated. This could be Monday afternoon, it could be Tuesday, and I now say to you, your Honor, you were improvident last Friday night. I move orally to dissolve on the basis of the presentation I have made."

I am telling you now I am going to extend it, but I would be open during or at the conclusion of your presentation, whether it be Monday afternoon or Tuesday or Wednesday for you to move to dissolve the restraining order.

I am not precluding you from that.

MR.ENGELHARD: I understand that, your Honor.

THE COURT: I think it would be improvident of me now to suddenly just throw the restraint out and yet at the same time tell you I am throwing the restraint out, go out on-- strike if you want to - but I am going to give you that hearing that you want beginning next Monday or Tuesday.

I just think from my point of view that that that would be very damaging to one party and I just have never really seen the tremendous damage that you will sustain.

You bargained for some time,your men are working. This is most important to me that they are working. They are not out on strike. They are not locked out, let's put it that way.

MR. ENGELHARD: If your Honor please, this is precisely what Judge Hayes was getting to, precisely.

After the words "status quo," he said, "Until

THE COURT: I think that he agrees with me.

Now, if I remember that case and I read it recently, the temporary restraining order, so to speak, was extended in that case over a month.

MR. GARTNER: 40 days, your Honor.

THE COURT: Of the outside limits of Rule 65.

I will tell you what I am going to do with you, sir, I will give you two choices.

I will give you the option of having me decide this case on the record I now have in which event I will extend the temporary restraining order to this coming Wednesday at 5:00 p.m. or I will give you the right to present any and all evidence you want beyond the present record and will extend the temporary restraining order to Monday the 10th at 5:00 p.m.

Those are the two options I give you.

I am going to extend the temporary restraining order, but I will decide the case on the present record, nothing more.

If you want me to, and there I will limit the extension from Friday night now until this coming Wednesday by which time I will have filed a decision on the matter of the motion for a preliminary injunction.

If you want to present evidence next week, I am

going to give you that opportunity, but I will extend the temporary restraining order to Monday, the 10th, at 5:00 o'clock.

I have made up my mind to extend it, but the question is with or without your submitting additional evidence in the form of testimony or anything else you want.

If you want to accept the option of putting anything else in, I will extend the temporary restraining order to what I consider the outside limit of Rule 65, which is next Monday at 5:00.

If you want to stand on the present record, I want to present an adequate decision so that you may take the matter up as you see fit and in that event, I will extend the temporary restraining order to next Monday at 5:00 -- next Wednesday at 5:00 p.m.

You have the option.

MR. ENGELHARD: Well, I am going to stand by my earlier decision or request that in the event that you needed further information, factual information, that I want the opportunity to present evidence.

THE COURT: I do think we do and I think that you will find that the decision will be more complete. It may even be beneficial to you in result beyond what it

would be on the present record.

I am not prepared to say because I haven't finally determined this case. It seems to me that if the issue here is bargainable, the plaintiff refused to bargain and violated its Section 2, Article 1 duty.

The defendant then could have gotten a declaratory judgment earlier.

There you have the other situation. To assert extent it might be argued the reverse of what you argued previously that the defendant created an 11th hour situation here.

Remember you argued that the plaintiff did. I am not sure at this point, frankly, who put us in the position where we are all working under a great deal of pressure.

I am not abot to make accusations, but I think the shoe could fit either foot.

I would suggest, then, gentlemen, that you tell me the earliest date next week you could return with witnesses who would be knowledgeable on the issues which were presented originally in live testimony and affidavit form which would take us through the bargaining negotiations so that I can determine whether one side or the other failed to bargain in good faith.

What is the earliest you could be back?

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MR. ENGELHARD: I am going to suggest that I make a call to Dr. Knowlton and tell him that the nursing home case will have to be put over and meet on Tuesday.

MR. GARTNER: Yes, your Honor.

I would also suggest for that purpose that it would be very helpful for us to have defendant's answer, which is due on Monday.

MR. ENGELHARD: It has been mailed.

MR. GARTNER: It has been mailed.

MR. ENGELHARD: Today.

MR. GARTNER: Very good.

So we will know what the issues are, what they contest and what they don't contest.

THE COURT: That would be helpful.

If you have one for the Court, it would be helpful for me. If I could have it on Monday, that would be all right.

MR. ENGELHARD: It will be filed on Monday.

THE COURT: Monday would be time enough. If you have one in court today, I would take it today.

MR. ENGELHARD: I don't.

It may have already been filed, as a matter of fact, but we will get an extra copy to the Court just to

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nevertheless suggest that, rather than relying completely on Rule 65-b, perhaps the Court could underline at the end of that sentence which starts, "Pursuant to Rule 65-b of the Federal Rules of Civil Procedure and its inherent jurisdiction to preserve its jurisdiction," so that there will be no question that the Court -- one of the main reasons why the Court is issuing this order is to assure the hearing which counsel has asked for.

THE COURT: I would sugesst that I made that very clear in the record here, and I doubt that anyone is going to be in the Court of Appeals with this matter before we meet again.

MR. ENGELHARD: As a practical matter, it would not serve any purpose. The appeal itself would be moot. We understand that.

THE COURT: The last thing that we will do before we recess tonight is to fix the date and the time of the resumed hearing. I think we had agreed that it would be Tuesday, February 4th. I will give counsel the option of beginning at either 9:30, which is my usual starting time, or if it would be more convenient for you both at 10:00 o'clock.

MR. ENGELHARD: I am an early riser. I have no objection to starting at 9:30.

JAPAN AIR LINES COMPANY, LTD.,

vs. 75 Civil 166

INTERNATIONAL ASSOCIATION OF MACHINSTS AND AEROSPACE WORKERS, AFL-CIO (IAM), et al,

New York, N. Y.

February 4, 1975 - 9.45 A.M.

(Hearing resumed)

MR. GARTNER: Ready for the plaintiff.

MR. ENGELHARD: An application, your Honor.

THE COURT: Yes, Mr. Engelhard.

MR. ENGELHARD: At this time I respectfully move orally to vacate the temporary restraining order which was signed by your Honor on Friday, January 31, 1975, on the basis that it is proscribed by the Norris-LaGuardia Act, specifically with regard to the time in which such a restraining order can, under its provisions, be in effect, specifically five days.

And inasmuch as this matter was on before your Honor prior to that date and there was an initial restraining order, I believe on the 22nd of January 1975, that at most, under the provisions of Norris-LaGuardia, the temporary restraining order had to, by its terms, or by the provisions of Norris-LaGuardia, terminate no later than January 28,

1975; that Norris-LaGuardia supersedes Rule 65 of the Federal Rules of Civil Procedure.

THE COURT: Do you have any authority for that other than your statement?

MR. ENGELHARD: I have, your Honor. In addition to the case which I cited to you, which was the Pan American World Airways case, there is reference to it in Emory Air Freight. I will have that citation for your Honor in just one moment.

(Pause)

Emory Air Freight Corporation v. Local 295 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. It is reported at 449 Fed. 2d 386. It is a Second Circuit decision decided in September of 1971.

And, in an opinion by Circuit Judge Feinberg, I call to your attention some of the language as used in discussing Norris-LaGuardia and discussing the provisions of a temporary restraining order under Norris-LaGuardia.

"Thus, before an employer in a dispute with a union can obtain an injunction, there are a number of conditions to be satisfied. Section 7 of the Act, 29 USC, Section 107, lists a good many of them, including the requirement that a temporary restraining order 'shall be

effective for no l[illegible]nan five days,'" and then it goes on to say "and that such an order should not be issued except upon 'testimony under oath, sufficient if sustained to justify the Court in issuing a temporary injunction upon a hearing after notice.'" And it lists further conditions.

The point is, your Honor, that it is apparent from Judge Feinberg's decision, it is apparent from Pan American Airways, which we cited to you last time, that even if there is testimony to support, I would assume, a primi facie case that an injunction should issue, that under Norris-LaGuardia the Court's jurisdiction lasts for no longer than five days without issuing a preliminary injunction.

And, of course, a preliminary injunction has certain prerequisites that I think we are all familiar with. But this motion is directed solely to the temporary restraining order which is now in effect, and for those reasons, your Honor, I believe that at this point the Court is without jurisdiction -- no. I believe that the Court should vacate its temporary restraining order.

Thank you.

THE COURT: All right. I will hear from Mr. Gartner.

You have a point which is not totally free from doubt, I'll say, although I veer against you for reasons that

I will discuss later. I understand your point and I think an argument can be made.

Let me hear from Mr. Gartner on the subject.

MR. GARTNER: As your Honor says, an argument can be made, and it would be useful and of perhaps more help to the Court if, instead of making oral motions every time defendant comes to court, the defendant would brief this question so that their argument can be made and our much more persuasive response, I think, can be made on papers.

But, since defendants choose to proceed orally, of course we will do the same.

The defendants keep referring to Emory Air Freight v. Local 295, which as they say was decided in 1971. The first thing to be said about that case is that the reference, the quotation from that case which defendants cited is a mere dictum.

There were many, many other grounds on which that case was decided. The Court held that the injunction should be vacated because what was before the Court in that case was a contempt order based upon the issuance of the injunction, the temporary restraining order.

And the Court held, in very clear terms, that the contempt order had been issued without a proper hearing, that the defendants in that case had not been given any

hearing at all, they had been told, strangely enough, that they would have a hearing a couple of days later and then, in the course of the same colloquy, the judge said, You've now had your hearing and I find you in contempt."

So that that was the basic holding of the case. In the course of discussing the order, Judge Feinberg then said what counsel has quoted. But it is a mere dictum. And it is not simply my say-so that it is a mere dictum. The Second Circuit three years later, in Hoh v. Pepsico, 491 Fed. 2d 556, in an opinion by Judge Friendly referring to the Emory Air Freight case, said that the employer in the Pepsico case was arguing that despite Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 US 235, Section 7 of the Norris-LaGuardia Act remained applicable when an injunction is sought in a labor dispute, even in aid of arbitration.

What the Second Circuit said in response to that bears quoting, and I quote:

"Perhaps this goes somewhat too far." That is the latest word of the Second Circuit on this issue, and they referred -- the opinion goes on to say, "See Textile Workers Union v. Lincoln Mills, 353 US 448."

Now, if I may stop at that point and refer to Textile Workers Union v. Lincoln Mills, which the Second Circuit specifically directed our attention to, in that case,

which was a case in which the Court held that an injunction may issue against an employer even though there it was a labor dispute, despite Norris-LaGuardia, in order to compel the employer to arbitrate in accordance with the terms of his contract, the Court specifically said, the Supreme Court specifically said, Section 7, the procedural requirements of the Norris-LaGuardia Act, do not apply.

And I think I can quote that section to the Court. In Textile Workers v. Lincoln Mills, 353 US at page 358, the Court said:

"Section 7 of that Act" -- the Norris-LaGuardia Act -- "prescribes stiff procedural requirements for issuing an injunction in a labor dispute. The kind of acts which had given rise to abuse of power to enjoin are listed in Section 4. The failure to arbitrate was not a part or parcel of the abuses against which the Act was aimed. We see no justification in policy for restricting Section 301(a) to damage suits, leaving specific performance of the contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act."

So the Court is clearly saying that the procedural requirements of Section 7 of the Norris-LaGuardia Act do not apply in a situation where an injunction is permissible, despite the provisions of Norris-LaGuardia Act.

Now, look at that in the context of this case. There is no question, and there has not been any question, for the entire history of the Railway Labor Act that injunctions may issue under the Railway Labor Act in aid of the purposes of that Act. There has been a long and continuous development. First the Supreme Court said --

THE COURT: They don't quarrel with that. They are saying that I can't keep a temporary restraining order in effect beyond five days without making the requisite findings and issuing an injunction. I think they concede that I have the power to make requisite findings within a five day period and issue a preliminary injunction. At least I'll accept that for the present purpose of our argument. So I don't think there is an issue there.

They say basically that by continuing the temporary restraining order beyond five days without making the requisite findings and issuing a temporary injunction, I in some way have lost jurisdiction or at least the temporary restraining order has been vitiated or dissolved by the passage of time, something like a lump ofsugar in a cup of coffee.

I don't accept their premise and I feel that what they are entitled to is a prompt decision, and yet at the same time they have to a certain extent put the Court on

the horns of a dilemma.

Last week, when you gentlemen were here, I indicated to you that I would make a determination, I think it was by today I said, on the state of the then existing record. It was indicated by the union that they wished to present certain witnesses. I indicated at that time that I had already committed myself to hearing those witnesses and would hear them at the earliest opportunity next week, which is now, this morning. That was the agreed upon time.

I would suggest that we proceed with the hearing itself. I think the practical thing for me to do is hear their witnesses. If the union wishes to stand on the procedural argument which counsel has made, I would suggest that he indicate that the union wishes to rest its case at this point and rely upon the record as it presently exists.

If counsel wishes to preserve the point for argument in the Court of Appeals, I would suggest that he can do that by the argument he has already made. I consider the jurisdictional point to have been made. But I think it becomes somewhat of an academic exercise to make the point and then to determine that you are going to proceed with the taking of testimony, for this reason. I'll be very practical.

I intend, by this coming Monday at five p.m.,

either to grant or deny a preliminary injunction. So the only advantage the uinion would have would be an argument made later to another court that the temporary restraining order had no effect, assuming I grant an injunction, had no effect between something like the 27th of january and the date I grant the injunction.

The principle of law as I see it is that you are required to obey orders on pain of contempt unless and until a court, whether it be this court or a higher court, dissolves those orders or vacates them.

I would suggest at this point that I am not prepared to rule favorably to the union on their motion to dissolve the temporary restraining order and I am not prepared to rule on the matter at all unless and until the union has chosen to rest its case. I've given them the opportunity to proceed.

I intend to move swiftly. I think it would be an abuse of discretion for a court to delay a determination unduly. That I recognize. But I would suggest that it does not constitute an abuse of discretion if a decision on a complex issue is made within twenty days of the date that issue was basically first presented to the Court, and it is my intention to do that.

So, for the record, since the union has made its

application, at this point I will deny the application to dissolve or vacate the temporary restraining order and I will leave it to the union, which has the option whether they wish to proceed by calling witnesses, who I note appear to be present in the courtroom, or whether they wish to rest on the record, at which point I will hear further argument from both counsel.

MR. ENGELHARD: If your Honor please, it is not my intention to belabor the point. I think, though, I am constrained to make the Court aware of a few things, or respectfully to clarify some of the things, that have been said.

When we met -- I guess the hearing was held on January 19[illegible] -- I at that time of course asked that the matter be transferred pursuant to 1404, and that was denied.

At that time the Court stated that it was about to commence, the following Monday, a criminal trial. At that time I believe I stated, I don't recall if it was off the record or on the record, that if necessary I will call my people and have them waiting outside the courtroom on the following day to testify.

Now, my understanding of Norris-LaGuardia is that the concept is speed in part, so that the parties can get back to what they are entitled to get back to, either to

negotiate about certain things, not to negotiate about certain things, but certainly to come to some resolution, the sooner the better.

And consequently, even on an appeal, it provides in and of itself for an expedited appeal.

We were ready, if we had the opportunity, to proceed on the 17th. Now, on the record, and it was done last week, and I thought I made it clear, and if I didn't I will try to clarify it now and clarify what was said a few moments ago, I wonder if that was really a choice that has been put to the union, to rest on the record.

The Norris-LaGuardia Act makes certain provisions to give the opportunity to a respondent or to a defendant to put in testimony, if it wishes, and I can't see, in good conscience, how the union could waive that if there is testimony that would refute that of the plaintiff or the party seeking the TRO.

So we are not really given a choice at all. You have said, "Yes, we can have a quick decision, but you are in effect going to waive your right to present testimony," and obviously we could not do that.

THE COURT: I'm not sure that you couldn't. You were in a position, once the company had rested its case, to determine whether they had made out a prima facie case on

the issues which must be determined by the Court. I suggest that in the event you determined that they had not, you would have been in a position to rest.

You did in fact present affidavit testimony which the Court read. I indicated at the time the hearing concluded that I would afford you the opportunity to supplement your affidavits by oral testimony. I indicated that I would afford you that opportunity at the earliest moment. I also indicated what the Court's schedule was.

It is unfortunate perhaps that matters which you consider important - that is, labor disputes - which I must suggest had been under negotiation for almost two years, by your standards should take priority over a multi-defendant, long time scheduled criminal case.

I can only tell you that this Court operates a full day, as you well know.

MR. ENGELHARD: I do.

THE COURT: And it would have been, I would suggest, rather a travesty for this Court to have attempted to try during the daytime a multi-defendant twelve count criminal indictment charging conspiracy and numerous other serious crimes and indicate to you that at night we could hear your matter.

Under the circumstances I exercised my discretion

and, as you know, I met with you during the course of the trial and indicated that if you wanted the opportunity to present witnesses, I recognized by commitment to you and I would give you the opportunity.

All I can tell you is that the temporary restraining order has been continued by this Court,because I believe the problems here to be serious, until next Monday at five. You've made an application to dissolve the temporary restraining order at the outset of the proceedings this morning. That application is denied.

I now give you the option. And I don't fault you; you certainly pursued this matter conscientiously and vigorously on behalf of your client at all times. I will give you the opportunity to do one of two things. I have indicated it already, but I will spell it out again.

You can rest on the record which is presently before the Court or present witnesses. If you choose to rest, I will hear argument. If you choose to present witnesses, I will hear argument, once both parties have rested, on the matter of whether or not an injunction should be issued, and it may be that I will be in a position, after I've heard everything that is to be presented, to rule rather quickly.

I think I have a better idea of the issues at

this moment and the burdens which in my judgment the parties should carry, and therefore I would suggest that you have a Court which is better equipped today to listen to your evidence and pursue the matters which are germane than perhaps the Court was on January 16th, when the first day of hearings was held and at which time the Court had only first learned of the case a relative few days before and actually you had not been able to present to the Court at that time, because of the shortness of time, any affidavits or written materials on the law.

A lot of activity has occurred since then which makes this morning's hearing, in the Court's judgment, a very important and meaningful part of the judicial process.

So you have your objection, you've noted it at all times, you've preserved the record at every occasion with the argument that the Court is without jurisdiction, and I have considered your argument. I say it is not free from doubt. I think you can find language in such opinions as that by Judge Feinberg, whom I greatly respect, but at the same time I must take what I believe to be a fair and practical approach here.

If I have erred, you will have every opportunity, as I know and you know, to argue this matter before the Court of Appeals within the ambit of this month.

The motion to vacate or dissolve the temporary restraining order is denied without prejudice to its renewal at such time as the parties have rested.

MR. ENGELHARD: I might remark for the record that while this was an oral application and I did cite some authority, I was putting Mr. Gartner in a position that I have been put in in a couple of occasions in these very proceedings. I did not do it deliberately, and apparently he was prepared.

THE COURT: I would suggest that this would have been a requisite of both of you going before the Court of Appeals a few days ago, because as I understand the thrust of your argument there it was much the same thing.

Now, there we had what I think was a distinguished bench. They were not prepared to rule out of hand on the matter. I think they regard the problem as a serious one, as I do. Under the circumstances, I think the better course of discretion at this point would be for me to hear everyone out and try to resolve the major issue,which you both concede I have jurisdiction to do, which is to issue or deny the issuance of an injunction, put the restraining order aside, that will become a moot matter.

MR. ENGELHARD: We don't agree with that. We don't think you do in this case have the jurisdiction to

issue the injunction.

THE COURT: On that score, I will rely on Chicago & Northwestern Railway Company v. United Transportation Union, and I say that the decision of the Court, albeit a close one, it was five to four as I remember, leads me to conclude that at the very least I have jursidiction to operate under the stricture that I should exercise my jurisdiction sparingly.

MR. ENGELHARD: I don't think it is necessary, certainly in light of your decision this morning not to grant my motion to vacate the TRO, to respond to Mr. Gartner's interpretation of Hoh v. Pepsico, which I happen to be familiar with, and also the ambit of Lincoln Mills.

THE COURT: Suffice it to say, the record reflects your disagreement with the position which has been articulated by the Court and by your adversary. And so it is quite clear, I think, from the point of view of the record, the record has been adequately protected by your objection and, as I say, I disagree with it, with your position, but would suggest that I don't consider the matter free from doubt, and perhaps at another time we will be back here and I may actually be in a position where I can study that problem in greater depth and perhaps rule on that matter and let that go up on appeal.

whether or not to exclude witnesses. Take your choice.

MR. ENGELHARD: May I have a moment, please?

THE COURT: Of course.

MR. ENGELHARD: I withdraw the application.

THE COURT: Very well. I will note for the record that there are now a number of potential witnesses, including parties and non-parties, for both sides. They will be remaining in the courtroom during the taking of testimony.

You may proceed, Mr. Engelhard.

DIRECT EXAMINATION

BY MR. ENGELHARD:

Q Mr. Ogoshi, you are also called Bill, aren't you?

A Yes.

Q By whom are you employed?

A I am employed by District 151 International Association of Machinists and Aerospace Workers.

Q And where do you maintain an office?

A In Honolulu, Hawaii.

Q And what is your position with District 151?

A I am the Senior Business Representative.

Q And how long have you been Senior Business Representative?

A Approximately five years.

present on behalf of the union?

A For the union, myself and the Committee of Nine --

Q Who was the committee?

A The committee is composed of Max Suzuki from Honolulu, Stanley Nagaoka and Frank Shiraishi from Honolulu. From San Francisco, Karashima, Hiroshima and Tarumi. From New York, Savino, McLaughlin and Puglia.

THE COURT: I think we had better get some spellings for the reporter.

(Pause)

Q Mr. Ogoshi, to clarify the record and perhaps to correct an error, there is a named defendant Rollo Savino. Is that his first name?

A That is incorrect.

Q What is his first name?

A Rocco, R-o-c-c-o.

Q At that November 6th meeting, who was the spokesman for the union?

A Myself.

Q And who was present for the plaintiff, the Japan Air Lines?

A Mr. Yonemura, Mr. Kasumi, Mr. Kuramoto, Mr. Hoashi, and Mr. Yamada.

Q Now will you tell us who the spokesman for Japan

refresh your recollection?

A Yes.

Q Will you tell us what, if anything, other than the unresolved grievances were discussed that day?

A I recall that only the grievances were discussed on the 26th.

Q Did you meet again on the 27th?

A Yes, we did.

Q And what, if anything, was discussed at that time?

A The union's proposals were discussed at that time.

THE COURT: One, two, more, less?

THE WITNESS: There were several. We began with the first section of the opening proposal, which was scope.

Q And what in particular about scope that you recall was discussed?

A We discussed about the Article D, I believe, and the layoff, the impact of layoff.

Q Is there anything else you recall that was discussed regarding the scope issue?

A I believe we asked for some information. I may be consufed here. The information regarding the number or man hours that were used by the contractors that JAL had.

Q Was anything else discussed at the November 27th

A Yes, I did.

MR. GARTNER: Objection. Can we have the identification of the people again? We seem to have slipped back.

THE COURT: All right. Let us do that. We are now on December 16. Who were the respective spokesmen at that meeting?

THE WITNESS: I was for the union and Mr. Yonemura was for the company.

THE COURT: Same people. Do you recall whether Mr. Quick was present at that meeting?

THE WITNESS: Mr. Quick was not present.

MR. ENGELHARD: Your Honor, if we may go a little bit afield, and I think we will save a lot of time:

Q When for the first time was Mr. Quick at negotiations?

A In the following meeting after that. In the January meeting.

Q January 1974?

A Yes.

Q Now let us go back to December 16, if you will. Would you tell us what you or anyone else on behalf of the union said with regard to your concern with scope or with Mercury Air Service performing the work?

A They mentioned that they had a problem on fuel,

there was a fuel crisis, as I recall at the time. And they were anticipating a reduction in force in Honolulu. And our point is that in a reduction in force that it was quite unfair that our people would be laid off, and if the company would still maintain Mercury Air Service.

Q Did someone from the company respond?

A There was no response on the part of Mr. Yonemura.

Q Did you meet on December 17?

A Yes, we did meet again.

Q Were the same persons the spokesmen for the respective parties?

A Yes.

Q Will you tellus whether or [illegible] discussion relating to scope?

A I seem to recall there was.

Q Do you recall what was said and by whom? Do you have to refresh your recollection?

A Yes.

Q Why don't you look at your notes.

A That was on the 17th of December?

Q The 17th of December.

A Yes.

Q Does that refresh your recollection?

A Yes.

Q Will you tell us--if you can testify without looking at your notes, we prefer it --

A All right.

Q -- will you tell us what was discussed on the 17th regarding scope?

A Yes. On layoff and also on the lead plant mechanic, and also the company, since we were concerned about layoff, the company, Mr. Yonemura pointed out that the company would try to minimize the impact of the fuel crisis layoff on manpower.

Q You testified a few moments ago that on the 16th of December there was discussion or request for certain information, some manhours information. Do you recall whether or not that was also discussed on the 17th of December?

A We again made a request of the information from the company.

Q You made it on both days or just one day?

A Can I look at my notes?

Q If you don't recall, yes.

A I may have the date confused.

Q December 16 and December 17 are the dates in question.

A (Referring to papers) It was an error on my part.

wc 28 Ogoshi-cross

THE COURT: All right.

A Yes, I phoned Mr. Phipps and asked him that I have information from my local committee chairmen in San Francisco that a meeting was to be held unbeknownst to me on November 12. So I asked him whether the company had any offer on scope. And he said he didn't know but the company had some offer. I asked him please to call up Mr. Kasumi to find out if they had any offer on scope. And if that was the case, we would meet with the company.

Q And otherwise? Did you say anything about otherwise?

A Otherwise that it seems to me it is fruitless to continue meeting with the company.

Q What about the specific language in the telegram? You sent this telegram, Defendants' Exhibit E, didn't you?

A Yes, I did.

Q In your conversation with Mr. Phipps, did you ask him why there was going to be a meeting when he knows very emphatically the company's refusal to bargain on scope?

A The reason why I put it that way, because on September 3, which was our last meeting prior to this impending meeting, meeting with Mr. Phipps was involving the meeting and to him the company's position was well known. The question was whether the company had any

movement on scope.

Q You say the company's position on scope was well known to Mr. Phipps on September 3, when he met with --

A Because the company had never made an offer at that time on scope.

THE COURT: That was what time?

THE WITNESS: September 3.

THE COURT: 1974?

THE WITNESS: Yes.

Q You say that he knew that that was the company's position. You say here the company's refusal to bargain on scope, that he knew it.

A I am talking to Mr. Peterpaul, explaining to him --

MR. ENGELHARD: If your Honor please, the telegram speaks for itself.

MR. GARTNER: Well, I am asking about the conversation with Mr. Phipps.

THE COURT: Let us make that clear.

MR. ENGELHARD: There is no testimony regarding the conversation with Mr. Phipps.

THE COURT: Let us get to it, then.

As I understand the purport of the telegram, Mr. Ogoshi had a conversation with Mr. Phipps on the night of October 22, 1974; is that correct?

THE WITNESS: That's correct.

THE COURT: What you have just said about asking the mediator to ascertain if the company had an offer on scope, when did you ask Mr. Phipps to ascertain whether the company had an offer on scope, so the Court is clear?

THE WITNESS: On the 22nd.

THE COURT: Did you add when you were asked the question something to the effect, that is, if the company did not have an offer on scope, otherwise it would be fruitless to continue meeting? Is that what you said?

THE WITNESS: Yes. That's right.

Q Also in that same conversation -- and, please, Mr. Ogoshi, I am talking about that conversation on October 22 with Mr. Phipps -- did you say to him that he knows very emphatically the company's refusal to bargain on scope?

A I am sending this information to Mr. Peterpaul.

Q Yes. Are you reporting to Mr. Peterpaul that Mr. Phipps knew very emphatically the company's refusal to bargain?

A Yes. This is the September 3 meeting. At that point we had nothing on scope. He was aware of the fact. So they called this second meeting. That is the way the second meeting came to pass.

Q Have you finished your answer?

We had asked them. The company just simply had made no offer.

Q Just had made no offer.

A Made no offer.

Q Had it made any other response?

A No.

Q Made no other response? How many times had you asked them to make an offer?

A From time to time, as my minutes showed, that when scope was discussed, and the company never made an offer on scope.

Q Never made an offer.

A No.

Q Did they make any other response?

A Yes, they were talking about layoff and --

Q No, but in response to your request for an offer, did they say anything?

A "We have no offer at this time."

Q That is what they said every time?

A Yes.

Q "We have no offer at this time"?

A That's right.

Q How many times did you ask the company to make an offer on scope?

A I can't recall how many times, but the minutes will reflect that when the subject of scope came up, this discussion would transpire.

Q Incidentally, Mr. Ogoshi, it was you, was it not, at the first meeting on November 6 who explained to the company what the union's scope proposal meant?

A We explained the whole union proposal.

Q And one of the items that you explained was the scope proposal, wasn't it?

A Yes.

Q Is the explanation set forth in your affidavit as follows? "It was explained at that time that 151 requested that work being performed at installations in Los Angeles, JFK, San Francisco, and Anchorage, at some time during the course of the agreement be performed by JAL employees represented by the IAM."

Is that the explanation which you gave of the union's scope proposal?

A That's correct, yes.

Q And you say that for a number of times after that you asked the JAL representatives to give you some offer with respect to that proposal?

A Yes.

Q Do you recall how many times, specifically?

A It would be three or four times, I guess.

Q And you say that each time the only response you got was that "We have no offer at this time"?

A That's right.

Q Who said that?

A Mr. Yonemura.

Q When was the last time that you asked for an offer?

A The last time? When I asked?

Q Either you or somebody from the committee.

A I believe the last time was during this current negotiations here in San Francisco.

Q You mean during last week?

THE COURT: I did not hear anything about last week.

A When we first came on the 15th, I believe it was.

THE COURT: The 15th of January?

THE WITNESS: Yes.

Q The 15th of January. Or during that series of meetings from the 15th to when? I will withdraw the question.

How many meetings did you have in San Francisco beginning from the 15th?

A We had the 15th, 16th, 17th, 18th, 19th. I didn't attend the meeting -- Thursday I flew in, Thursday night,

I believe it was.

Q What date?

A 16th, I think.

Q You mean you flew into San Francisco on the 16th?

A No, no, I flew into here, to New York.

Q On the 16th of January?

A On the evening of the 16th, I believe it was.

THE COURT: Just for the record, that was a Thursday, was it, January 16? According to my notes, it was a Thursday.

THE WITNESS: Yes, a Thursday.

Q When was the last meeting between union representatives and the company representatives that you attended in San Francisco?

A The last meeting?

Q Yes.

A Oh, the last meeting was Friday, the 31st, I believe, January 31.

Q January 31.

THE COURT: That was last Friday?

THE WITNESS: Yes.

Q Last week, last Friday, is that right?

A Yes.

THE COURT: Was there any discussion of scope at that

representatives?

THE WITNESS: Yes. I remember Mr. Kasumi saying that it was -- well, I can't say the exact words -- that we had no right to bargain on scope.

Q Did anybody respond for the union?

A Yes. Mr. Quick responded.

Q What did he say, if you recall?

A Well, Mr. Quick's position, as I recall, was that the union has always negotiated scope, scope has always been a subject of negotiations.

Q Is that what he said? Not what his position was, but what did he say?

A I can't tell you the exact words.

THE COURT: In substance. I know you don't know the exact words, remember the exact words, but the substance of what he said, to the best of your recollection.

THE WITNESS: That scope was part of the negotiations, has always been part of the negotiations.

Q Do you recall last Friday did Mr. Quick say anything about the scope issue?

A Last Friday?

Q Yes. On the 31st of January.

A No.

Q Do you recall whether Mr. Kasumi asked the union

affidavit?

A This Article 1 of the contract.

Q The one that is headed "Scope of Agreement"?

A Yes.

Q You did participate in the 1972 negotiations that led to that orange book, Defendants' Exhibit A?

A Yes.

Q Do you recall that there came a time when a Mr. Saito came from Tokyo to participate in those meetings?

A Mr. Saito, yes.

Q You remember that he came?

A Yes.

Q Do you remember when he came?

A I can't recall.

Q If I refresh your recollection, can you place it in terms of whether it was before the mediation began or after the mediation began?

A Before the mediation began.

Q Before the mediation. As a matter of fact, wasn't it just at the end of the negotiation conferences that he came?

A Yes, that's right.

Q Do you recall what he said at the meeting?

A I recall that he was speaking in Japanese and there

was an interpreter for him.

Q Do you recall what the interpreter said? You don't speak Japanese yourself?

A No, I don't.

I recall he had a long dissertation on how long he was with the company and the routes that the company were flying; he mentioned something about a program for the future, five-year plan, a projected five-year plan establishing South American bases, and --

Q In other words, he was telling you the company had plans to expand its bases?

A Yes.

Q Did he tell you anything else, if you recall?

A No, I don't recall.

Q You don't recall anything else?

A No.

Q The union at that time had also made a proposal to change paragraph D of Article 1 of the orange book, Defendants' Exhibit A, had they not, in 1972?

A Yes.

Q In essentially the same language that you have referred to here as your scope proposal in these negotiations; is that right?

A Yes.

Q Do you recall anything that Mr. Saito said about that proposal?

A I believe I recall that he was talking about expansion and I believe he mentioned that there was no plan at this time to open up any areas in the mainland use.

Q Did he tell you that the company would make up its own mind when it decided to open up new stations?

A I don't recall that.

Q And that it would not discuss it with the union?

A No, I don't recall that.

Q You don't recall that?

A No.

Q Mr. Ogoshi, you testified that on December 17 you raised the question of possible layoffs in the negotiations with the company, and the impact of the fuel crisis. What layoffs, specifically, did you refer to, if you referred to any specific layoff?

A We were talking about -- the first station that would be hit was Honolulu.

Q What jobs were you talking about?

A All mechanics and ramp service.

Q What kind of work do the employees of Mercury Air Service do in Los Angeles?

A Ramp service.

Q No mechanics work, do they?

A No, not that I know of.

THE COURT: Could you describe to me what you mean when you say "ramp service"?

THE WITNESS: It's the loading and unloading of baggage and cargo on and off the aircraft, and storing the cargo in the warehouse.

Q In the present agreement you do have a no-layoff clause, don't you?

A Yes.

Q Which provides what? What does it provide?

MR. ENGELHARD: Objection, your Honor. It speaks for itself.

Q Would you tell us where it is in the agreement?

THE COURT: I think that is a reasonable request.

May I have a copy of the agreement at this point, if you have another one. The exhibit, of course, has gone up to the Court of Appeals. I think it would be helpful if you have a copy for me to follow it.

MR. GARTNER: I think I have one, your Honor (handing).

THE COURT: You have been asked to point out the provision or provisions of the 1972-1973 agreement which relate to the subject of layoffs.

THE WITNESS: Yes, it is on page 69.

Q Page 69, Appendix E.

May I have that for a moment, please.

A Yes (handing).

Q In these current negotiations, isn't it one of the union demands that that provision for no layoff shall continue in effect?

A That's correct.

Q Isn't that Item No. 4 under Article 1, Scope of Agreement, in Company's Exhibit 1?

MR. GARTNER: I believe it is one that is attached there, your Honor.

Q So that,Mr. Ogoshi, under the current agreement and under your proposal in these negotiations, the company would not be permitted to lay off any employee?

A Under this current agreement?

Q Yes.

A We take that position.

Q Yes. All right.

A It was challenged by the company.

Q I understand that. But it is your position that under the current agreement the company cannot lay off any employee, and that is what you are asking for in these current negotiations too, isn't it?

A Yes.

Q That the company should not have the right to lay off any employee?

A Yes.

Q That would apply to all employees in Honolulu, wouldn't it?

A For everywhere.

Q Everywhere, including Honolulu?

A Yes.

THE COURT: What if any position has the company taken with regard to the no-layoff request that the union has made?

THE WITNESS: They have proposed to delete and substitute the proposal, calling it a substitute position.

Q Can you explain a little more as to what the substitute position proposal is?

A It's a very difficult thing. We have not gone into it at length, because the union wanted to reinstate or keep this contract clause into effect.

Q So you don't really understand what the company has proposed?

A We understand the substance of it is to keep the surplus employees on the payroll.

Q Keep the surplus employees on the payroll?

A On the payroll even though they are not productive.

Q That is the substance of the company's proposal, correct?

A Yes.

THE COURT: And that matter, as I understand it, is still the subject of negotiation?

THE WITNESS: Yes.

THE COURT: Is it the position of either party, Mr. Ogoshi, that if you can reach agreement on either a no-layoff provision or on some proposal such as the substitute proposal that the company has put forward, if you can reach agreement on one or another, or a mix of those, would that take the scope question out of the current bargaining negotiation? Is that the position that has been advanced by anybody?

MR. ENGELHARD: Objection, your Honor.

THE COURT: Overruled.

Do you understand my question?

THE WITNESS: Would you repeat it, your Honor?

THE COURT: All right. As I understand it, the union is asking in their no-layoff provision for what I will term for the moment "job security" -- is that a fair statement?

THE WITNESS: Yes.

THE COURT: All right. The company has put forward a substitute proposal.

Let me rephrase my question and ask you this: If the company were to agree to the no-layoff provision that you have had up to now in the new contract and thus assure job security, is it the union's position that that takes care of the scope issue?

THE WITNESS: Let me ask you this, your Honor.

THE COURT: Go ahead.

THE WITNESS: You mean if it is legal, in a sense, it is legal to negotiate scope; if it were legal?

THE COURT: Well, let us assume for the moment that there was no restraint from the Court.

THE WITNESS: Yes.

THE COURT: Yes, let us assume that. Then what is the company's position?

MR. GARTNER: The company's position?

THE WITNESS: The union's position.

THE COURT: I am sorry, the union's position.

THE WITNESS: Simply this, your Honor: We have our employees who are working in ramp classification, mechanics classification, storekeeper classification, plant classification, all these fully in Honolulu, in part in San Francisco, where we have ramp servicemen, plant maintenance

done, plant maintenance and aircraft maintenance done by United Air Lines. We have three storekeepers there in San Francisco; at JFK we have the whole cargo warehouse that is ramp service work and we have people there performing that work; and just in the cargo, what we call the cargo and warehouse area, not too far in the terminal area, where the passengers' aircraft comes in, the ramp service work is done by Allied.

In Los Angeles, the ramp service work is done by Mercury. I believe the mechanics' is done by United Air Lines.

Our proposal here is that employees in time of layoff, in time of reduction in force, should be able to be transferred in accordance with the contract, they would bid out their positions available wherever the company has its operations; under the contract bid to those positions and perform that work, rather than to be surplus and stand by and not perform any productive work.

THE COURT: Is that the whole of the union's position?

THE WITNESS: Yes.

THE COURT: So am I correct that you are not saying to the company, "Look, we have so many people who are members of the union, and we want you to go out and,

instead of having the subcontracting or leasing, we want you to set up your own company forces, company employee staff operations, and add employees beyond the number the union already has to staff those positions"?

I just want to understand the union's position. What you have said now is that to avoid union employees' being placed on standby, or I assume you mean furloughed, they should be transferred to other areas where the company is operating.

MR. GARTNER: That is not what he said.

THE COURT: I am trying to find out -- maybe I haven't phrased it quite right -- I would like to know if it is the union's position that new and additional employees should be added to the company work force in these locations.

Is it a matter of transferring existing people so that they can maintain their jobs, or is it hiring new people, additional people, beyond the ones already employed by the company, who would hopefully be members of the union?

THE WITNESS: In the first instance, that is the primary objective.

BY MR. GARTNER:

Q To add new people?

A No, to take care of the people who are being laid off.

Q How do you do that, under your proposal? How do you take care of the people that are being laid off when you say under the contract we don't have the right to lay them off? Who is going to be laid off if under the contract we don't have the right to lay them off?

A Under this contract you have the right to lay off certain people who are not on the payroll effective a certain date. Those people hired after May 18, 1973, are subject to layoff. Then also for the fact that if I am a mechanic at Honolulu and I am offered a job in San Francisco, a mechanic position which is now performed by United Air Lines, for some reason, if I have reason not to accept that offer, I may be laid off.

THE COURT: What does the union want?

MR. GARTNER: I don't understand this.

Q Is it your proposal --

THE COURT: Please.

MR. GARTNER: Excuse me.

THE COURT: What is it the union proposes? Assuming there is no restraint on your bargaining and you bargain for what you want, what is it that the union wants from the company relative to the union members now or in the

future to be employed by the company?

THE WITNESS: We want the employee to be able to go wherever -- to fill positions that are working now, to every station that is available, that JAL is operating.

Q How do positions become available at those stations? You want us to hire our own people at those stations, don't you? Because otherwise there are no available positions; isn't that correct?

THE COURT: I think there are two questions here. Let me see if I can ask a question that will clarify the matter in my mind, because I must suggest that up to this point my state of mind had been somewhat different.

According to the papers before me, the company presently has a certain number of, for example, ramp and maintenance people and stores people in certain locations. For the moment, if I recall the numbers, most of those people are located in Honolulu.

MR. GARTNER: Not necessarily most.

THE COURT: Well, let us get the numbers.

MR. GARTNER: Approximately a third, a little more than a third. I think there are about 90 in Honolulu, and the others are in other stations, in New York and in San Francisco.

On page 5 of Mr. Kasumi's affidavit it shows 90

people in Honolulu, 56 people in New York, 53 people in San Francisco, and 3 in Los Angeles.

THE COURT: Taking the total number that have been given us -- and I will use this as a figure, which may not be completely accurate -- at the present time, as I understand it, there are a total of 212 JAL employees at Honolulu, JFK, San Francisco, and Los Angeles, as I understand it.

Is it the union's position that you want the jobs of these 212 people guaranteed at some location serviced by the company?

THE WITNESS: That's the first instance.

THE COURT: What is the second?

THE WITNESS: The second one, yes, sir. The work employees perform under the certification craft and class of mechanics wherever performed by the company in the mainland use has been negotiated by the union and where the company is operating, that type of work, we propose that over a prescribed period of time that the company have its own employees perform that work.

MR. GARTNER: That is, hire new employees.

THE COURT: Well, do you intend by your proposal that the company should finally have more than the present number of employees at these various locations, or is it your purpose to insure that these 212 people are assured

jobs of similar type and classification?

THE WITNESS: Yes. The different stations, where currently -- where there is a surplus, if there is a surplus from Honolulu, what happens, is due to a reduction in force, there is the bumping procedure, and there is no place to go but place layoff, these people should be permitted,if they want, to go to Los Angeles.

THE COURT: Even though the company at the present time has no maintenance personnel at Los Angeles, has no plant maintenance personnel, and has no ramp service personnel; is that it? In other words, you would want those people who are surplus, say, from Honolulu to be given positions in another location where the company is operating where, for example, the company may be sub-contracting those services now; is that the union's position?

THE WITNESS: Yes, and where the company maintains its so-called supervisors and coordinators, they have their own employees to supervise the contractor in the performance of that type of work.

THE COURT: The second part of my question -- and I am going to let Mr. Gartner resume -- is this: Is it the union's intention that after all is finished there will be more than the present number of employees in the employ of the company?

THE WITNESS: There would be, obviously. There would be, if it is implemented in the period of time, that eventually there will be more people.

THE COURT: In other words, you are not just taking into account a loss of jobs and a transfer of people; you are also expecting that the number of people overall will increase?

THE WITNESS: Finally increase, yes.

THE COURT: And you would expect, I would assume, that in time the leasing or subcontracting operations would be either phased out or reduced?

THE WITNESS: That's correct.

THE COURT: And replaced by company employees?

THE WITNESS: Yes.

THE COURT: Thank you.

BY MR. CARTNER:

Q Mr. Ogoshi, isn't the company's proposal for substitute positions in essence what you said was your first objective, that is, if there was surplus in Honolulu those people would be offered an opportunity to have a job at some other station? Isn't that the company's substitute proposal?

A The impact of that proposal is to keep surplus people on the payroll without being productive.

Q That is under the contract they can do that, can't they?

A Yes, and the surplus people can be laid off, under the layoff clause.

Q The substitute position proposal is that those surplus people would then have an opportunity to bid on some job in another station; isn't that the substitute position?

A Only in the stations where the surplus are.

Q That is your understanding of the substitute position proposal?

A Yes.

MR. GARTNER: Your Honor, I think we have this in evidence already as Company's Exhibit -- until we find the exhibit number, your Honor, it is the fourth attachment to the Kasumi affidavit of January 13. I think your Honor can find that. Exhibit 4 to that affidavit. Plaintiff's Exhibit 2 in evidence.

THE COURT: That is the letter dated November 26?

MR. GARTNER: Yes.

THE COURT: 1974. Yes.

MR. GARTNER: The attachment to that letter, the next to the last on the last page, section headed Appendix E.

Q I will ask you to look at that, and I will ask you

whether that is the substitute position proposal which the company has made in these negotiations?

A Yes, it is.

THE COURT: What position has the union taken on that proposal?

THE WITNESS: We have rejected that proposal and requested the company to keep the present Appendix E proposal in the contract with the elimination of item 8.

THE COURT: Item what?

THE WITNESS: 8.

THE COURT: "Any cessation of work because of circumstances beyond the company's control."

THE WITNESS: Yes, your Honor.

THE COURT: You want that out.

Q Now, this substitute position proposal, Mr. Ogoshi, refers to Article 7K of the present contract, that is, the provision which permits bumping, isn't it?

A That's right.

Q And that is to be preserved under the company's substitute position proposal, isn't that right?

A Yes.

Q And the proposal then goes on to say that "An employee given notice of layoff in a period up to April 30, in addition to his rights under Article 7K, shall have the

right to take the substitute position created at the time of his notification of layoff." Isn't that correct?

MR. ENGELHARD: Objection, your Honor. The documents that are in evidence speak for themselves.

THE COURT: Yes, true. Sustained.

MR. GARTNER: All right.

Q Despite the fact that the union and the company have been negotiating about either a no-layoff provision or a substitute position provision, the union is still insisting upon what you call the scope proposal, isn't it?

A We are at this time prohibited.

Q Very good. Up until January 22, Mr. Ogoshi, you were insisting upon the scope proposal, weren't you;

A Until the time that the restraining order was effected, yes.

Q Yes.

THE COURT: Mr. Ogoshi, at the time this Court issued its restraining order, which was January 22, just before that time, were the parties actively negotiating a new contract?

THE WITNESS: Yes.

THE COURT: As of January 22, would you tell me how many issues remained open between the union and the company?

THE WITNESS: January 22? I think we have a

balance of about thirteen proposals.

THE COURT: You say about thirteen proposals remained open?

THE WITNESS: Yes. I believe on January 14, when we reconvened in negotiations, we had about forty proposals open.

THE COURT: On January 14 you had about forty?

THE WITNESS: Forty.

THE COURT: And on January 22 you had it down to about thirteen?

THE WITNESS: Thirteen.

THE COURT: Have the parties engaged in any negotiations since January 22?

THE WITNESS: Yes.

THE COURT: And can you tell me if the negotiations have been continued up to today -- let's put it that way -- or yesterday?

THE WITNESS: Yes.

THE COURT: As of today, how many issues remain open between the union and the company?

THE WITNESS: I believe at last count about twelve or thirteen.

THE COURT: About the same as existed on January 13.

Of the twelve or thirteen issues --

THE WITNESS: Your Honor --

THE COURT: Yes?

THE WITNESS: -- I am thinking the last count. Presently I couldn't tell you. As of the 22nd, you know, it was thirteen. On the 14th of January when we came to San Francisco to negotiate, there were forty proposals open. Subsequently, including up to the time of the restraining order and thereafter, we continued to negotiate and at this moment I believe it is thirteen open issues.

THE COURT: I should like to ask you, if you can tell me, the subjects which are still open.

THE WITNESS: I have minutes of all the proposals that are open and those that were of a certain date. I have that.

THE COURT: I should like to know that if I may have it.

BY MR. GARTNER:

Q Do you have it with you?

A Yes, I have it.

THE COURT: I think it would be germane to my decision here.

MR. GARTNER: Could you step down and get it or have someone hand it to you?

THE COURT: Why don't you step down and speak with

counsel.

MR. ENGELHARD: If your Honor please, the only question I have of the Court is that he is now going to use these minutes to refresh his recollection.

Now, I glanced at them. I didn't look at them thoroughly. There may be positions on that one piece of paper which are confidential.

THE COURT: All right, let me do this. Whatever he is referring to, I will deem added to Defendants' Exhibit C for identification, which were his earlier minutes. However, I will not show them to counsel until first -- that is opposing counsel -- until first you have seen them, and then we will deal with the problem. In other words, it may be as you say, there are very current bargaining positions on it.

All I want now, really, is for the witness to relate for the record from his own recollection and refresh it from these notes which are deemed to be part of Defendants' Exhibit C for identification what the open issues are.

MR. ENGELHARD: I understand that, your Honor.

THE COURT: All right.

Mr. Ogoshi?

THE WITNESS: Yes. I have a record of all the open

proposals effective 1/22/75 at 12 p.m. noon. This list of twenty open items, namely, these are all union proposals.

Proposal No. 2, which has to do with the dates of implementing scope.

Proposal No. 3, which also has to do with the scope language.

Proposal No. 4 also no layoff clause.

Proposal No. 5, which was to provide for lead men coverage.

Proposal No. 9.

THE COURT: You go from 5 to 9?

THE WITNESS: Yes. The storekeeper language.

No. 12, starting time of bids -- bidding on starting time, excuse me.

THE COURT: Bidding on starting time. All right.

THE WITNESS: Proposal No. 20, eight-hour work. Eight-hour work guaranteed if there is no break period.

THE COURT: In other words, you would go on overtime after eight solid hours of work; is that the proposal there?

THE WITNESS: No, your Honor. For instance, I am working today and I am working overtime, and between the time that I quit today and the time that I am supposed to report tomorrow at my regular hour there is no ten-hour break, then I will be guaranteed eight hours of pay; in the

event I do come to work, they can't send me home.

THE COURT: I understand.

THE WITNESS: And Proposal No. 21, one additional holiday.

Proposal No. 23. It has to do with overtime rules.

49A, which has to do with business representative's pass on the airlines.

Q The business representative -- that is, you -- should have a free pass on the airline?

A Yes.

THE COURT: While you are on union business; is that it?

THE WITNESS: Yes.

Q On union business for JAL or any of the union employees?

A JAL employees.

Proposal No. 54, pension plan.

55. Medical.

58. Prohibit nonunion employees from performing bargaining unit work.

THE COURT: That is 58?

THE WITNESS: Yes. Just one moment.

60. The freezing of part-time employees.

63. Wage increase and the effective dates.

66. License premiums.

THE COURT: I don't think I understand that one.

THE WITNESS: The aircraft mechanics are required to have licenses.

THE COURT: And they get something extra if they have more licenses?

THE WITNESS: Yes.

68. Cost of living allowance.

69. Longevity pay.

74 and 75. Effective date and duration of the agreement.

That's the number of proposals we had open as of that date, January 22.

THE COURT: Is that the number of proposals which you have open as of today?

THE WITNESS: As of today, we have thirteen. We have reached agreement on Proposal No. 5, No. 9, No. 12, No. 20, 23, and 49A.

THE COURT: Is there one more? I have checked off six from twenty, and you had said twenty down to thirteen.

5, 9, 12, 20 --

THE WITNESS: 23 and 49A.

THE COURT: That is six. And you had said you had, if I recall, twenty open and now you have thirteen, and I

would have thought by my arithmetic there should have been another one.

THE WITNESS: Fourteen, that's correct.

THE COURT: All right.

BY MR. GARTNER:

Q Mr. Ogoshi, you were present, you testified, at the last meeting in San Francisco on January 31?

A January 31? Yes.

Q Did you hear any conversation at that time between the representatives of the company and the representatives of the union with respect to the possibility of reaching agreement so long as the court proceedings are going on?

A The 31st is when we were waiting for the court decision while we were in negotiations.

Q I asked you if you had heard any conversation.

A From the company?

Q Either side.

A With respect to what?

Q With respect to the possibility of reaching an agreement while the court proceedings were going on.

A We have taken the position --

Q Who said what, Mr. Ogoshi?

A Mr. Quick has said all along that if the company --

Q I am asking about January 31.

THE COURT: If Mr. Quick said it all along, let us hear about what he said all along, and then you can ask if he said it on January 31 or whatever. All right?

MR. GARTNER: All right.

THE COURT: What has Mr. Quick been saying all along?

THE WITNESS: When the restraining order came into effect, we still had 20 percent wage proposals, and we reduced that to 15 percent.

MR. GARTNER: I object to it, your Honor. I asked a specific question, and I don't want a recital --

THE COURT: I suggest that the Court will be able to ascertain -- so far I would suggest I haven't written anything down because I know precisely what you are asking, and I will wait until that point in the witness' answer. We don't have a jury here, and I want to hear what the witness has to say.

MR. GARTNER: All right, your Honor.

THE COURT: Go right ahead, but please at the end of it tell me what Mr. Quick had to say.

THE WITNESS: We had proposals there, Mr. Quick and the union's position. If the company will agree to the remaining proposals of the contract -- the open issues -- we can have a settlement.

Q But the remaining open items include your Items No. 2 and 3, which were the scope proposals?

A No, it is not. Precluding scope.

THE COURT: What was that word?

(Record read)

Q What are you looking at, Mr. Ogoshi?

THE COURT: Let him answer the question.

MR. GARTNER: I am not sure what he is doing.

THE COURT: He is thinking.

MR. GARTNER: I am sorry.

THE COURT: You go right ahead.

So far I have just heard "precluding scope." You tell me the rest of it.

THE WITNESS: The union would be agreeable to accept a contract containing all the remaining issues without the scope as proposed in -- I believe we have a proposal made -- to the company at that time.

Q When was that said? Or was that said all along, as you say, by Mr. Quick?

A This is after the restraining order.

Q This was after the restraining order was issued?

A Yes.

Q On what day?

A It may have been the 30th.

Q It may have been the 30th? Do you have any notes from the 30th?

A No, I don't have any.

Q You don't have any notes; you are recalling entirely on your memory?

A Yes.

THE COURT: That would have been last Thursday?

THE WITNESS: Thursday, yes.

Q Is it your testimony that the union on last Thursday said that if the company accepted all of the union's open proposals, without any concession on scope, that they would have an agreement?

A With this exception, I am sorry: that in the event the scope issue is decided in court, that we can negotiate scope, we will negotiate scope.

Q In other words, you are leaving open the question of negotiating some more on scope if the Court said that you had a legal right to negotiate on scope?

A That is correct.

Q Oh, that was the exception, right?

A That was the exception.

THE COURT: And if the Court decided that scope was not bargainable, are you telling me that you would be prepared to drop the issue, provided the company and the

union reached agreement on all the remaining issues?

THE WITNESS: If the Court -- using the appeal route and everything, if it is finally decided?

THE COURT: Well, you can take it any way you want.

THE WITNESS: No, we'd have to appeal the decision of your Honor, of course, if the Supreme Court decided it in finality that we cannot bargain, we have no alternative.

THE COURT: Well, assume the Supreme Court were to find that scope was not a bargainable issue, then of course at that point the union would drop the issue. Would that be for all time or until perhaps we had a new Supreme Court?

THE WITNESS: I hope I live that long. If I live that long, I may be able to.

THE COURT: I don't think you have to answer that. I think I understand the union's position.

Q I believe, Mr. Ogoshi, in that proposal that you made, did you indicate whether at the time that it might become possible for the union to negotiate on scope because of the court decision, if no agreement was reached on that, what did you indicate the union's course of action would be?

A Would you please rephrase that? I didn't follow you on that.

MR. GARTNER: I will withdraw the question.

and Mr. Quick responded it is in violation of the no furlough clause, and I believe the question of where do the people go in the event there is a layoff came up.

Q Are you saying now that you recollect it?

A Yes.

Q Do you recall that came up?

A Yes.

Q Who said it?

A Mr. Quick said that that is a violation of the contract.

Q Yes?

A Of the no-furlough clause, and that the union proposed to put the employees that are furloughed in other areas.

Q Is that all you recall now about what Mr. Quick said?

A And he also said that when the company refused to do this, that in the event that the contract is submitted for ratification, if there is no scope provision, then the contract would not be ratified, or words to that effect.

Q He did say that on August 3?

A Yes.

Q And you recollect that now?

A Yes.

MR. GARTNER: I would like to offer in evidence, your Honor, the page of Mr. Ogoshi's notes dated August 3rd, if I may just take this out here and offer that one page.

THE COURT: Before you look at it, would you permit Mr. Engelhard to examine it, see if he has any objections of ongoing negotiation privilege?

MR. GARTNER: I think we both already looked at it together.

THE COURT: I think there is enough of a foundation, absent that type of objection, Mr. Engelhard, to permit it to be admitted as past recollection recorded.

MR. ENGELHARD: I have no objection.

xxx (Plaintiff's Exhibit 11 was received in evidence.)

Q Mr. Ogoshi, referring to the first mediation session, which began on June 25, 1974, do you have any recollection of what was said at that time and who was present? Let's start with who was present.

A For the company, Mr. Yonemura, Mr. Kuramoto, Mr. Hoashi, and I believe Mr. Shibano.

Q Was the union committee there that you have already testified to?

A Yes.

Q And you were there.

MEjg 2 Ogoshi-cross

A Yes, I was there.

Q Anybody else?

A Mr. Quick and the mediator. The mediator was Mr. Willits.

Q Do you recall what, if anything, Mr. Willets said in the morning? I mean at the joint meeting, not at any meeting that he had with the union separately.

A I believe he said if the company had any offer on scope.

Q That was one of the first things he said?

A That's one of the things, yes.

Q And was there any response?

A No, the company had no response, had no offer on scope.

Q No response at all?

A They said they had no offer on scope.

Q Who said that?

A Mr. Yonemura said that.

Q That's all that you recall?

A I recall that we discussed the odd items in the contract proposal.

Q With reference to the scope question, do you recall anything else?

A On that particular day?

Q Yes.

A No.

Q Do you have notes for that meeting?

A I have here a caucus that we had.

Q No, I am not interested in a caucus.

A I think Mr. Engelhard knows of this portion of the minutes, I believe, on the caucus, on the private caucus with the mediator.

Q I am not interested in the private caucus. Is there anything in your notes which indicates what was said in the joint meeting with respect to scope which may refresh your recollection?

A Yes, we have some comment from -- I have the question asked by the mediator, Mr. Yonemura -- and Yonemura saying, "Since some settlement has been reached between the IAM and other companies, we'll be prepared to settle along their pattern." He said, "Fuel cost is the biggest problem. The cost is four times" --

Q Mr. Ogoshi, I am not asking you to read from your notes. I am asking you whether your notes refresh your recollection about what else was said, if anything, about the scope question.

A Yes. If I may continue here, he said -- I have here in the notes that Mr. Yonemura stated that at our last

meeting the company stated their position clearly and the prospect is dimmer now.

Q "The prospect is dimmer now."

Do your notes refresh your recollection about -- any more about what the mediator said?

A He asked this question. He asked if the union feels that the company is willing to settle the scope problem.

THE COURT: Who is "he"?

THE WITNESS: Mr. Willets, asking Mr. Yonemura. So the discussion centered around scope, as I recall, and either a matter of discussion -- and there was not at that time any part of Mr. Yonemura saying that scope was not negotiable.

THE COURT: We will take a recess at this time.

MR. GARTNER: All right. Thank you, your Honor.

(Recess)

THE COURT: You may proceed.

MR. GARTNER: All right. Just a few more questions.

BY MR. GARTNER:

Q The last mediation meeting took place on November 13, 1974 between JAL and IAM, isn't that right?

A Yes.

Q Do you have a recollection of discussions about the scope issue at that time?

A Yes, I have some.

Q Can you tell us, did Mr. Kasumi say anything about it?

A Yes. In fact, as I recall it, this was the first time in the company --

Q Excuse me, Mr. Ogoshi, if I may interrupt you. I just want you to relate who said what at that meeting, to the best of your recollection. Don't tell me if it was the first time or last time or whatever, just who said what at that meeting, if you remember.

A Mr. Kasumi said -- I won't quote word for word -- that scope was not a negotiable matter -- not in exactly that term -- but it's a management right and it is therefore not a negotiable matter, let me put it that way, and went on to say that the employees of JAL fortunate to have employment with JAL at this time and there is nothing to prevent JAL from laying off the employees of JAL.

THE COURT: When was this that Mr. Kasumi made those statements?

THE WITNESS: On the 13th.

MR. GARTNER: November 13, 1974.

Q Did anybody respond for the union?

Q This was the substantial offer that the company had in mind when it requested the meeting?

A Yes.

Q Who did Mr. Quick ask that of?

A Mr. Quick --

THE COURT: This was on November 13th?

THE WITNESS: I believe it was on November 13th.

Q And did Mr. Quick say anything about scope at that time or any other time during the meeting?

A No, not that I can recall.

MR. GARTNER: I have no other questions, your Honor.

MR. ENGELHARD: Just a few, if you please.

REDIRECT EXAMINATION

BY MR. ENGELHARD:

Q You testified a few moments ago that on November 13th Mr. Kasumi made a certain statement regarding scope, in effect that it was not negotiable, in substance.

At any prior meeting to November 13th, 1974, at which Mr. Kasumi was present, did he ever make such a statement to the union?

A No.

Q Do you know or do you recall whether or not anyone else from the company, whether Mr. Kasumi, Mr. Yonemura or

anyone else representing the company, made such a statement to the union prior to November 13, 1974?

A No.

Q Now, when I asked that question, and I think when you gave your answer before to Mr. Gartner you said that was what Mr. Kasumi in substance said, were there any other similar type words used by Mr. Kasumi or Mr. Yonemura or anyone else representing the company, prior to November 13, 1974, such as "not obligated to bargain, not bargainable, unlawful, illegal" or anything similar to "non-negotiable"?

A No.

Q Now I draw your attention to the date that you signed your affidavit. I believe that was January 18, 1973. That was signed in my office?

A Yes.

Q Now, in preparing the affidavit, I believe you stated earlier to a query by Judge Ward that other people, or another person was present at that time.

Who was present at the time you prepared your affidavit besides yourself and besides me?

A First there was just myself, you and your associate.

Q Mr. Jauvtis?

A Yes. And, secondly, Mr. Quick.

MR. ENGELHARD: Thank you.

DIRECT EXAMINATION

BY MR. ENGELHARD:

Q Mr. Quick, would you tell us by whom you are employed?

A I am employed by the International Association of Machinists and Aerospace Workers.

Q And what is your present position with the IAM?

A I represent the International. My actual title is Grand Lodge Representative.

Q And how long have you been a Grand Lodge Representative?

A Since March 15, 1968.

Q And as a Grand Lodge Representative, what are your duties?

A The Grand Lodge Representatives in the air transport industry are assigned certain territories. My territory is for airlines only and related. It is California, Hawaii, Oregon and Washington, the state of Washington.

My duties are to oversee and cooperate with and assist business representatives and members in the air transport industry, assist them in negotiations, arbitration, organizing, et cetera.

Q Before being a Grand Lodge Representative, what was

mediator was present. Do you recall when that was?

A Last Friday.

THE COURT: No. When a representative of the National Mediation Board was there.

MR. ENGELHARD: If the Court please, Mr. Quick is correct. If you recall, on a voluntary basis the parties have been meeting with a mediator, and I'll withdraw that last question and rephrase it.

Q Prior to the parties being released by the National Mediation Board, will you tell us -- do you recall the last mediation sessions?

A Yes, sir.

Q When were they?

A The last mediation sessions prior to our release -- the sessions were November 12th and 13th.

Q And where were they held?

A At the Ramada Inn, San Francisco Airport.

Q And were you present during those negotiations?

A I was.

Q At all times?

A Yes, sir.

Q Up to and including November 12th, 1974, had the parties had any discussions, so long as you were present at any of the sessions, with regard to the issue called scope?

A Yes, quite frequently.

Q Were there any discussions between the parties with regard to the negotiability of scope?

A Never.

Q At some of these sessions you attended, was the mediator present, other than November 12th?

A Yes.

Q Was there anything said by the mediator -- well, let's identify him. Who was the mediator during the negotiations?

A The mediator was Mr. Walker Phipps of Stockton, California.

Q During the negotiations, when Mr. Phipps was present -- I don't mean and I'm not referring to any of the discussions that may have taken place between one party and the mediator but only where there were joint meetings; in other words, not while the parties were caucusing.

Was there anything said by Mr. Phipps with regard to either party's position on the negotiability of scope?

A No.

THE COURT: Had anyone raised the question with Mr. Phipps up to and including November 12, 1974 as to whether scope was a bargainable issue or was not a bargainable issue? Had anybody raised that question with him up to and

including that date?

THE WITNESS: Not to my knowledge. He didn't talk like it. He talked with us and he was surprised on the 13th when it was raised.

THE COURT: In other words, you are saying that the first time it was raised was the 13th, and at that point it was raised by whom?

THE WITNESS: By Mr. Kasumi of Japan Air Lines.

Q Now, if I may, let's get back to November 12th, 1974. At that time did the parties discuss the various issues before them, or the remaining issues?

A Yes.

Q Was scope one of the issues that was discussed?

A Yes.

Q Now, at that time, who was the --

MR. GARTNER: Excuse me. I've lost the time.

THE COURT: November 12th, 1974. I had moved it ahead and counsel in his examination has now gone back to focus on the 12th, the day before.

Sorry. You may proceed.

MR. GARTNER: I'm sorry.

Q On November 12th, who was the spokesman for Japan Air Lines?

A Mr. Wayne Kuramoto.

Q And was Mr. Kasumi present at that time?

A He was.

Q Will you tell us what was said, to the best of your recollection, on November 12th by either side, either party, with regard to scope?

A On the 12th.

Q On the 12th.

A Well, the union took the position, and I would say --

MR. GARTNER: Excuse me, your Honor. Could we ask Mr. Quick to say who said what rather than --

THE COURT: I think he was about to do that, and I was waiting for it. I know he has been present here and I'm certain that he knew that we would start taking notes when he started to tell us who.

THE WITNESS: Yes. I was about to, in the next sentence.

THE COURT: You go right ahead.

THE WITNESS: The spokesmen for the union throughout, when I entered the picture, was Bill Ogoshi and myself, and discussions were held on all of the proposals, including scope --

Q You are talking about on the 12th?

A On the 12th.

Q What was said specifically by the parties with

regard to scope, either their positions, their offers, counter offers, if anything, or what?

A I as spokesman for the union insisted that we have an offer on scope. As I recall, there was no long discussion on that particular issue along, because we discussed other issues.

Q Now, at that time --

THE COURT: Wait a minute now. Let's stay with that.

Try to tell us what you said in exact words or substance. You just said you insisted. But why don't you tell us what you said, to the best of your recollection.

THE WITNESS: To the best of my recollection, I told them that they had just made several offers in addition to what had been on the table at our previous meeting, in September. See, we had recessed for a long time.

THE COURT: Yes.

THE WITNESS: And that we had to have something on scope to satisfy our membership. And I gave them the reasons, including the previous negotiations and ratification. And so they were going to --

Q What were the reasons?

A The reasons were that the previous negotiations we took a vote and Bill Ogoshi and I visited all three

stations, explained the contract to them, and there was a tie vote. We had to revote the contract, and it carried slightly. It was revoted by mail.

THE COURT: That is the earlier contract that was just expiring.

THE WITNESS: That was the one in '73 we signed May 18th in Honolulu. And at that time, in Honolulu, we had a situation where the entire negotiating committee, consisting of three from each station, nine in total --

MR. GARTNER: I object to this, your Honor. This is not binding on theplaintiff, and unless we are going to be allowed to question with respect to internal union affairs --

THE COURT: All right. Sit down. It is not responsive to the question and I am going to direct the witness to try to respond.

Now let's try once again. You are now talking on November 12th, Mr. Quick, and you are talking about scope. You just tell us everything you said at that time, to the best of your recollection, in words or substance.

THE WITNESS: Well, --

THE COURT: You said you had to have something on scope to satisfy your members. Why don't you take it from there.

THE WITNESS: Because of the background. And I was asked what was the background.

Q In other words, you were asked at the meeting what the background was?

A No. You just asked me what was the background.

Q No, no. I am trying to --

THE COURT: Yes. Give us the conversation. I assume for the moment that you started off by saying "We've got to have something on scope to satisfy our members." Did you continue talking? If so, what did you say? Did someone else pick up that conversation? If so, what did that person say? Just tell it as it was.

THE WITNESS: On the 12th, as I recall, there was no long dissertaion for thirty minutes or so on scope. We had mentioned it as we had in the past, and it was an important issue, and that we would get a rejection if we took it out.

In substance that is about what it was on the 12th.

Q Well, did the company at that time, on the 12th, make any kind of a proposal regarding scope?

A Yes, the company did.

Q And can you tell us to the best of your reoclllection what proposal it made? And in giving your answer, tell us

who spoke or who said whatever was said on behalf of the company.

A Yes. Well, they told us that they could make some slight --

THE COURT: No. See? You said "they."

THE WITNESS: Wayne Kuramoto told us that the company was prepared to make a slight move on scope. And I'm not using his words. I don't remember exactly the words he said.

THE COURT: You don't have to. What you do have to do is to tell me to the best of your recollection either the exact words or the substance of what he said.

THE WITNESS: All right. Thank you.

THE COURT: All right. Mr. Kuramoto said what?

THE WITNESS: The company was prepared to make some slight move on our proposal of scope.

Q And what did he say?

A And he said that -- Wayne said that the company would put plant maintenance mechanics in San Francisco.

Q Let me stop you for a moment. Were there JAL plant maintenance mechanics in San Francisco at that time?

A No.

Q Who was performing that work at that time?

A United Airlines.

Q Go ahead.

A And that the company further was prepared to put automotive and plant maintenance mechanics at JFK.

Q Now, at that time were there plant maintenance mechanics and automotive mechanics employed by JAL at JFK?

A Plant maintenance mechanics but not automotive mechanics.

Q Was there anything further with regard to that offer?

A No. That is as far as the company would go.

Q Was there a timetable with regard to implementation of that offer at that time?

A As soon as -- yes, there was.

Q What was said?

A The timetable was as soon as the company could lease space at San Francisco for this automotive and plant maintenance department.

Q And what about at JFK? Was there any timetable with regard to JFK, if you recall?

A I think it was the same setup. I don't think there was any timetable.

THE COURT: All right. When those words came out of his mouth, was there further conversation on the subject?

THE WITNESS: There was.

THE COURT: Tell us who said what.

THE WITNESS: I said to them, "We have that in Appendix D now."

Q And what was their reply?

A "And that does not satisfy our proposal." And Wayne said, "That is as far as we can go."

Q Did he give any reason at that time as to why JAL would not go any further on scope?

A Yes, he did.

Q Will you tell us what reason was given? And state who said it.

A Wayne said to us that due to thefinancial condition of the company and the cost involved, the company could not agree to anything further on our scope proposal.

Q Was there a response at that time by you or somebody else from the union?

A Not that I recollect.

THE COURT: Let me hear the answer again, Mr. Greenberg.

(Record read)

Q Let's go back to the negotiations that took place in August, the latter part of August of 1974. Do you recall those negotiations prior to Labor Day 1974?

other words, you don't have a present recollection on the subject.

THE WITNESS: I do. But I can't explain it. I can explain it to you if I am given the opportunity.

THE COURT: You can't explain beyond telling us what was said. You can't recall it.

Do you have a way of refreshing your recollection so that you could tell us what was said on the subject? That is, do you have notes that you made, or by some reference to Mr. Ogoshi's notes could you refresh your recollection so that you could tell us with a refreshed recollection what was said back in August?

Q Let me see if I can help. Do you recall whether or notthere were any discussions during that period of time regarding a membership vote on the package offered by JAL at that time?

A Yes.

MR. GARTNER: Your Honor, excuse me. There are many ways of refreshing a witness' memory.

THE COURT: Not by leading questions.

MR. GARTNER: Not by leading questions.

THE COURT: No, not your own witness, on a vital area. And that's just what you did.

Sustained. That's why I tried to help him. If

Q Let me withdraw that question and go to a slightly earlier time. I think I will try to refresh your recollection.

Do you recall having any meeting or negotiation meetings with JAL in the early part of August or the late part of July?

A Yes, sir.

Q Were you present at those sessions?

A I was present.

Q Do you recall at that time whether or not the issue of scope was discussed between the parties?

A I do.

Q Do you recall what was said by either representatives of the union or representatives of JAL with respect to scope?

A I do.

Q Will you tell us what was said, to the best of your recollection,during that period of time, or if you can mail down the date, even better.

A Yes, sir. I believe it was Saturday morning, but in any event it was August 3, which was the last day of that series of several days of meetings, at San Francisco. I said to the company that we must have something on the scope rule that we have been discussing furloughs and layoffs

in the last couple of days, among other things, and we just have to have something on our proposal.

And Mr. Yonemura said that, no, they had gone as far as they could go, and that they could agree to nothing.

Q Did --

A We had a caucus and we came back, the union committee had a caucus, and we came back and we told the company --

Q Did you? You said "we."

MR. GARTNER: Excuse me.

A I told the company. I was spokesman at that moment, and I told the company that we had decided that this committee could not go out and recommend acceptance of the contract unless there was some change, clarification, a change in the scope rule. That was August 3, 1974.

Q What if anything did the spokesman for JAL respond?

A As I recall, there was no response.

Q Was anything said at that time by either party regarding the negotiability, bargainability or lawfulness of that subject?

A No, sir.

THE COURT: What did you do at that point? Did

everybody leave? Or did you do something else?

A The meeting recessed. We were in mediation. The meeting recessed.

THE COURT: Did there come a time when you met again, and if so, when?

THE WITNESS: The latter part of that same month, August, we did meet again. As a matter of fact, it was determined that date, the 3rd, what date we were going to meet, and it was decided to meet at Honolulu, which we did.

Q Let me go back for a moment to August 3, 1974. Can you tell us what if anything precipitated the union's or your position, or what you said to the company, regarding scope?

A We were trying to impress on the company, the union spokesmen, our spokesmen, trying to impress on the company how important this issue was to the membership.

Q Was there any event that occurred that had anything to do with your taking that position?

A Yes.

Q What was that?

A The previous day the company had given us a chart, a list of employees who were to be furloughed. I believe nine, nine or ten people.

Q Now let us go forward. You said that at that

time, at the end of the meeting of August 3, you agreed upon a new date for resumed negotiations.

By the way, was this with the mediator present?

A Yes, sir.

Q You met again in the latter part of August.

A Yes, sir.

Q Presently do you recall what if anything was said by the parties during those negotiations? And, please -- if there was, regarding scope -- identify the parties who were speaking.

A What time are you speaking of?

THE COURT: Now it is late August.

Q Late August.

THE COURT: Early September, 1974, late August, the way I understand the question.

MR. ENGELHARD: Yes.

A Well, during those days -- and we call them the sessions -- in those days we discussed the various proposals, and on Labor Day I remember specifically that we tried to pin the company down on scope again.

Q Please say what was said and who said it.

A All right. At that time I told the company, Mr. Yonemura, the spokesman, on Labor Day, that some progress had been made, but we still had to have something on

scope. And they made an offer on other items but refused to make any move on the scope rule.

Q What did they say about scope?

A Mr. Yonemura said that the company was in no position to negotiate further on the scope rule.

Q Did he say why the company was not in a position?

A Yes. He brought up the high price of fuel, that the company pays more than any other company for fuel, and the cost of making installation, at which time I told him that in Los Angeles there is no installation involved, because you have the biggest warehouse in the system.

Q Did he respond to that?

A That I had visited the warehouse. He did not respond to that. "Our position has not changed," he said.

Q Did Mr. Yonemura remain the spokesman during that day, Labor Day 1974?

A No.

Q What if anything happened, to your knowledge?

A Well, to my knowledge there was a caucus about 7 o'clock in the evening or 8 -- it was after dinner -- by the company, and when the company members returned, Mr. Yonemura was not with them. And I asked -- no, and Mr. Kasumi stated that Mr. Yonemura would not be back in the

negotiations, that he had been relieved and that Wayne Kuramoto would be the spokesman for the company henceforth.

Q Was there anything else, to your recollection, discussed besides the various issues themselves at those negotiation meetings in the latter part of August, early part of September, 1974?

A Yes, we discussed scope again that same evening after Mr. Yonemura had departed.

Q What was said and tell us who said it.

A I insisted that we have something on the scope, as Wayne Kuramoto was reviewing again all of the pending issues. And of course scope was Nos. 1, 2, and 3, as I recall.

Q Is that how it was listed on some document?

A Yes. On the union's opener, under Section 6.

THE COURT: Your opener, as I recall, followed the articles of the prior contract.

THE WITNESS: Correct.

THE COURT: And my recollection is that Article I of the prior contract is the scope article.

THE WITNESS: Yes. Yes, sir. And we numbered our proposal --

MR. GARTNER: Excuse me, your Honor. Perhaps it would save time if we could clarify now -- and I think

THE COURT: We now have in evidence the union's opener as Defendants' Exhibit F, and it is numbered. So am I correct that from now on, when you refer to items by number, you are referring to the numbers which appear on the Defendants' Exhibit 6?

THE WITNESS: That is correct, sir.

THE COURT: Very well. Now, on scope, what was talked about that Labor Day evening?

THE WITNESS: Well, Wayne for the company was going through -- was answering us about no change in position, and Mr. Kasumi spoke up and said to us that if the overtime problems continue we are going to furlough everybody at San Francisco and farm out that work. And the meeting ended shortly thereafter.

THE COURT: What were the overtime problems that he was referring to? What did he say? So I can have some background.

THE WITNESS: Well, he didn't say anything at that time, but there had been some two months before.

THE COURT: But that was now a matter in the past?

THE WITNESS: Yes.

THE COURT: In other words, if they reoccurred, then there might be some necessity to furlough people at San Francisco?

THE WITNESS: Yes, sir. There was a misunderstanding of the overtime rules at the time. We corrected it.

Q But that related to San Francisco?

A Only, yes. Where they didn't get overtime work.

Q That had nothing to do with the nine -- did it have anything to do with the nine people who were discussed earlier, who would be furloughed from Honolulu?

A No. This overtime problem occurred several months prior to that, knowledge of the layoff. It had nothing to do with negotiations.

Q During those mediation sessions, then, covered through Labor Day 1974, was there any discussion about a topic other than the actual proposals -- I will withdraw that question.

Was there any discussion during those negotiations that lasted through Labor Day 1974 other than the proposals and counterproposals of both parties, do you recall?

THE COURT: Do you understand the question? I have some problem with it, and if you understand it, try to answer it. If you don't, counsel will rephrase it.

THE WITNESS: I am not so sure I understand it, no.

MR. ENGELHARD: I will rephrase the question.

Q Was the union asked to take any action of any kind with regard to the proposals as they then existed as of Labor Day 1974?

A Oh, yes, yes. It was a continuous thing.

Q Can you tell us what action if anything was asked of the union to take?

A Yes. Mr. Yonemura, and then later Wayne, as spokesman for the company, every time the slightest concession on anything was made, insisted that we take the package out for a vote by the members.

Q You were the spokesman then?

A Correct.

Q Did you respond to that?

A Yes, we did. I did.

Q When did you respond to that?

A On each occasion.

Q Was there any response to that during negotiations, the session of negotiations covering the Labor Day 1974 period?

A Yes.

Q What did you respond?

A We explained to the company that at that point we would take out to the membership for a vote the package on the table the day after Labor Day.

Q Did you say that you would do or not do something with regard to those proposals?

A Yes, we did tell them.

Q Not "we."

A I told them our position.

Q What did you tell them?

A I told the company that our position was that without a change on the scope we were going to recommend no.

Q Did you give any reason at that time to the company for making such a recommendation?

A Yes.

Q Can you tell us what that reason was?

A That reason was that we knew that the members would vote the contract down anyhow, as before. And we were under orders by the members to get something on scope.

THE COURT: Is it necessary for your bargaining committee to recommend a yes or a no when you present a proposed agreement to the membership, or are there times when you take no position? I just want to have some background as to the manner in which you operate.

THE WITNESS: Well, your Honor, the Machinists Union policy -- it isn't in our constitution or by-laws of the local district or International -- but our policy is of the International that if an International representative or

Grand Lodge representative is involved in any way in the negotiations and ratification, we will make a recommendation for or against. That is the policy. And I have violated that policy in '72 by making no recommendation. And of course I won't do it again because of what happened.

So we had to make a recommendation, and we either had to recommend yes or no. And in our judgment we could not recommend yes.

THE COURT: What did you actually say to him in your own words?

THE WITNESS: To the company?

THE COURT: Yes. I have got some su bstance of conversation here, which was basically without a change on scope you were going to recommend no. But I would imagine that you may have said more, and if you said more, I should like to know what you said and then if he said anything in response, what he said.

THE WITNESS: I said to Wayne Kuramoto, because -- yes, that was on the day after Labor Day. I said to him, "Wayne, we are in one hell of a spot. You have on the table approximately the United Air Lines wage offer, what they settled for back in May and other airlines have settled for approximately the same thing. A little bit better changes but not enough to tell. And you are not

quite on it on percentage. But far and beyond that -- and he, and Wayne, said, "OK, we will take a look at it." And caucused, came back, and they came up to the same percentage as United on wages.

And I said, "That still won't do it; if we could even get Los Angeles on this scope, where you already have a warehouse, and we came down in our previous negotiations to that one station, if we could just get that, Wayne, we could go out and recommend yes, because I am telling you this contract will not be accepted. I have been in 175 ratifications in my life, and it will not go. Even if we recommend yes, it will be voted down. And we have to recommend no, because of our obligation and what the members have told us in our previous meetings."

Q I am confused --

A And this is exactly what we told him.

Q I am confused about one thing you said.

MR. GARTNER: Could we have that answer read back, your Honor?

THE COURT: Yes.

(Answer read)

Q I want to clarify. You said that on the caucus they came back, or words to that effect, and took care of this wage differential.

THE COURT: I see.

THE WITNESS: I think two in New York.

THE COURT: 97 percent against. I have it.

Q Now let us go to November 13, 1974. Were you present at those negotiations?

A I was.

Q Will you tell us whether or not scope was discussed at all by any of the parties present that day?

A Yes.

Q Would you tell us what was said, and identify who was saying whatever it was that was said?

A Well, again the company was insisting that we go out for a vote. And I told Mr. --

Q Excuse me. Please say who was doing the insisting and what they said if you would.

A Wayne Kuramoto was insisting that we go out for a vote. And I said to him that we know when to go out for a vote among our members, and the time is not now. We cannot take another vote, because our policy provides if a substantial change has been made between the last offer which was voted and a strike situation, then we have to take another vote. That is our policy, which we follow. We did not feel that a substantial change had been made.

And he asked, "What is it going to take to get an

agreement?" Wayne asked this.

THE COURT: This is on the 13th?

THE WITNESS: Yes, on the 13th.

A And I said to him, "You have to make some change in the scope rule before you are going to get an agreement, in my opinion."

And the company went out in the hall or some place for a caucus of about fifteen, twenty minutes, and they came back, and Mr. Kasumi said that the company is in no position to discuss or to make any change in the scope rule in this agreement, because it's not a bargainable issue; and, as far as he is concerned, the matter is closed. And, as far as the contract is concerned, we have gone as far as we can go, this is our final offer.

At which point I said to him and to the company -- and the mediator was present -- I said, "Well, what you have done, and I want to remind you," I said, "you are in New York December 7, '72, Wayne was in New York December 7, 1972, and I want to tell you what you have done is put us in the same position that we were in when Grand Lodge representative Tim Connolly was talking to you at that time."

And at that point the company got up and walked out, and I thought they were going for another caucus, and

A I entered the negotiations for the first time with Japan Air Lines representing the union on December 7, 1972, here in New York.

Q Were you at that time, on December 7, did you become chief spokesman for the union?

A Yes, on December 7.

Q At that time was there a mediator in the picture?

A Yes, there was. Had just entered mediation that day before.

Q Can you tell us whether or not there were any proposals regarding scope, as set forth in your present Section 6 demands on scope?

A As I recall, the proposals were essentially the same.

Q Can you tell us approximately how many collective bargaining sessions you had from December 7 on until an agreement was finally reached?

A I believe two, each one over a period of days.

Q What I meant to say was, approximately how many days of negotiation did you actually have from December 7 until you finally reached some agreement?

A Well, that December 7 meeting blew up. We went back in negotiations in San Francisco, downtown, the 22nd of

Japan Air Lines was performing maintenance work in the cargo warehouse at JFK?

A At the time this was negotiated?

Q Yes.

A They were not.

Q Since the execution of the contract, is Mohawk Air Lines or any other person other than JAL performing the maintenance work in the cargo warehouse at JFK?

THE COURT: Let me ask the question in a different form, because Mohawk Air Lines is no longer a separate entity.

MR. ENGELHARD: That is correct.

THE COURT: At the present time do you know who is performing the maintenance work on the equipment in the cargo warehouse at JFK formerly performed by Mohawk Air Lines?

THE WITNESS: That was Mohawk Service Company, sir, not Mohawk Air Lines. But anyhow that contract was canceled on or approximately October 1 of that year as in the agreement. In other words, they complied with the agreement. Japan Air Lines did put in its own five or six plant maintenance mechanics.

THE COURT: So it is your testimony that at the present time the work formerly performed by Mohawk is

presently being performed by employees of the company who are members of the union?

THE WITNESS: Correct. Yes, sir, your Honor.

Q Can you tell us at what point during the course of negotiations Appendix D and Appendix E were agreed upon?

THE COURT: Don't they speak for themselves? I see each of them has a date. I see March 20, 1973, for one --

MR. ENGELHARD: I will withdraw the question, your Honor.

THE COURT: I will withdraw my statement as to "E," as it does not seem to be undated. Perhaps you will rephrase your question.

MR. ENGELHARD: Yes.

Q Can you tell us when the parties, JAL and the IAM, agreed to the provisions that are set forth in the 1972-1973 agreement?

A Yes, sir.

Q I am not talking about ratification; I am talking about prior to ratification.

A These two apendices were conceived at a dinner at El Cortez Hotel one evening, in San Francisco.

THE COURT: When?

Q When? is the question.

A I am sorry, I do not know the precise date, but it had to be a day or two prior to this March 20.

THE COURT: 1973?

THE WITNESS: 1973.

THE COURT: Were both of these supplementary agreements represented by Appendix D and E agreed to at that same dinner?

THE WITNESS: In principle. In principle. Between the company, the union, and the mediator.

Q And were the provisions of the agreement taken to the membership for ratification?

A That is correct.

THE COURT: Did the committee recommend a yes vote?

THE WITNESS: No, we did not.

THE COURT: I think you said before --

THE WITNESS: There was no recommendation.

THE COURT: -- that you did not make a recommendation, now that I think of it.

THE WITNESS: That is correct.

Q Do you recall, was the ratification by a voice vote or a secret ballot or how was it done?

A It was done by secret ballot at each station.

Q Do you recall how many people were in the

bargaining unit at that time?

A No, I do not. Approximately the same number, I believe.

Q Do you recall what the outcome of the vote was, the ratification vote?

A It was a tie vote, the first time in our history.

Q What do you do with tie votes?

A That's what we wanted to know.

Q Who breaks it?

MR. GARTNER: I object. That is even more irrelevant than some --

THE COURT: It is irrelevant.

Q Will you tell us what you did as a result of the tie vote?

A We took another vote.

MR. GARTNER: I object, your Honor. This really is irrelevant.

THE COURT: I think he is almost finished. Let us finish off.

A We took another vote by mail and it carried-and we signed it.

THE COURT: Anything else?

MR. ENGELHARD: Not on this.

THE COURT: On anything.

MR. ENGELHARD: Oh,yes.

THE COURT: How much more do you have?

MR. ENGELHARD: Your Honor, I have perhaps ten or fifteen more minutes.

THE COURT: All right. We will finish in fifteen minutes. Don't disappoint me. I have been sitting here listening to things that are undisputed, and maybe part of it is my fault, but I want to get on with this. This hearing is going to end today or tonight.

You may proceed, counselor.

Q Mr. Quick, are you familiar with what the job or what maintenance work, line maintenance work is?

A I am.

Q Will you tell us what that work is? Define the duties.

A The line maintenance mechanics at line service stations meet the aircraft when it lands and disperses passengers; they go into the cockpit, or one does, the lead, and he receives the logbook, which is kept up-to-date by the crew members, the captain or the copilot, the engineer, to see if there are any squawks, anything is wrong with that airplane. And then the mechanics work off those squawks, which can have been detected by the crew in flight. And then they do a walk-around of the airplane,

walk-around inspection, to determine if there are any deficiencies or defects that were not detected from instruments in the cockpit. If there are any, they make repairs.

They check the tires for all leaks, rivets, loose rivets, etc.

And that's about it.

Q Where is that work actually performed?

A At the terminal.

Q Is it performed inside or outside of facility?

A Outside facility. At the terminal, parked at the gate.

Q Can you tell us where JAL subcontracts that particular work?

A JAL subcontracts that particular work at Anchorage, Los Angeles, San Francisco, and JFK.

THE COURT: And they have been doing it all the time since the union has been dealing with them?

THE WITNESS: As far as I know.

Q Do you know what equipment is required to perform that particular work?

A The particular work I mentioned? No equipment is required.

THE COURT: Do you work with your hands?

THE WITNES[illegible], sir.

THE COURT: [illegible]n't have tools?

THE WITNESS: Well, you have hand tools furnished by the employee. I was a line mecahnic.

THE COURT: Why don't you tell us what equipment you have used. I have watched people maintain aircraft, and I haven't noticed them using their hands exclusively. I have noticed a variety of equipment around the plane.

Q Do they use trucks, for example?

A Mechanics don't need trucks. They need pliers and wrenches.

THE COURT: And ladders, right?

THE WITNESS: An occasional ladder. The fueler has the ladder there.

Q Are you asking for the work of the fueler?

A No.

THE COURT: What else do they use in the way of equipment?

THE WITNESS: If they run into real trouble, like an engine change --

THE COURT: That is right. What do they use?

THE WITNESS: That is not normal,everyday maintenance.

Q Is that the kind of work you are asking for?

A No, sir.

Q The changing of engines?

A Absolutely not.

Q By the way, where is an engine changed? Is it changed indoors, outdoors, or where?

A If a hangar is available, they change it in the hangar. If the hangar is not available, they change it on the line across from the ramp. We call it the apron.

Q Have you in your own experience seen engines changed outdoors?

A I have changed engines outdoors.

Q In Anchorage, Alaska, for example?

A They do outdoors in Anchorage. I didn't, because I worked in Washington, D.C., in Pittsburgh.

THE COURT: You never worked in Anchorage, have you?

THE WITNESS: No, I haven't.

Q Have you ever seen engines changed in inclement weather?

A I have.

Q In rain?

A In snow, in rain, yes, in Cleveland.

Q Are you asking that JAL give the IAM the right, or your bargaining unit, the right to make major overhauls?

A No.

Q Are you familiar with the Los Angeles facility of JAL?

A I am.

Q Can you describe for us the structures that JAL operates there?

A JAL has a warehouse at Los Angeles, and it is larger than the one in San Francisco or JFK.

Q What do they use that warehouse for?

A Receiving and dispersing air freight.

Q Do you know whether or not they occupy the entire building?

A They do not now.

Q At what time did they?

A It's my understanding this did. I visited the place; that's all I saw at it was JAL last year.

Q Since last year have you seen at that facility --

A It was last year China Air Lines and Airlift, each uses part.

MR. ENGELHARD: No further questions.

THE COURT: We will resume at 2:10 p.m.

(Discussion off the record)

(Luncheon recess)

THE COURT: Therefore I'll permit the question to be asked, and if you can answer the question, fine. This would go then to yesterday, apparently here at the courthouse, you had a conversation, Mr. Quick, with representatives of the company, including Mr. Kuramoto, and I would like to have you tell us what was said.

Q Was there anybody else at this conversation except Mr. Kuramoto?

A I think Mr. Kasumi heard it.

Q All right.

A He was standing there.

Q All right. What did you say?

A The exact words I said to Wayne were, "Wayne, you have a hell of a big warehouse in Los Angeles. Why don't you put thirty, thirty five people in there to do that work, I'be observed it, and maybe we can get out of here, wind this thing up."

Q All right. And before that time, Mr. Quick, have you made any similar proposals with a specific number of people, a specific number of jobs that the union wanted?

A We gave the company a schedule.

Q That was the schedule which you gave them on January 20th, right?

A That was one of them. We gave them on Labor Day

too, I believe.

Q Well, let's talk about the one you gave them on January 20th. Is this the schedule which you gave them (handing)?

A I believe that is true. Yes, that appears to be the one we gave them.

MR. GARTNER: All right. May I have this marked as Plaintiff's Exhibit 13, please?

(Plaintiff's Exhibit 13 was marked for identification.)

xxx MR. GARTNER: I offer it in evidence, your Honor.

MR. ENGELHARD: May I pose a question?

THE COURT: Yes.

MR. ENGELHARD: Rather, may I have the last question to Mr. Quick read back?

THE COURT: Yes.

(Record read)

MR. ENGELHARD: The reason why I asked that question, if your Honor please, is that this was the schedule attached --

MR. GARTNER: Do you want me to ask whether these were the other proposals too? All right. Excuse me. If that's what you want, all right.

Q Weren't these the other proposals which you presented to the company at the same time, Mr. Quick?

A Yes, sir.

MR. GARTNER: All right. I offer it now, including the schedule of new jobs that the union wanted.

MR. ENGELHARD: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 13 for identification. was received in evidence.)

xxx Q Now, Mr. Quick, the union's proposal number two on Plaintiff's Exhibit 13, which is prefaced by the sentence "JAL shall implement IAM's proposal on Scope as follows," has a listing of locations - San Francisco, Los Angeles, JFK, Anchorage - and, in the succeeding three columns, dates placed opposite specific classifications of work.

Does that proposal mean that on those specific dates, at those locations, you wanted JAL to employ all the personnel necessary to do all of that work?

A Yes, sir.

Q Thank you, Mr. Quick.

Now, would you tell the Court, please, what your wage proposal was on that date, on January 20, 1975? You have it in your hand, if you need to refresh your recollection.

THE COURT: It is not necessary -- I'm willing

(Plaintiff's Exhibits 16, 16A and 16B were marked for identification.)

xxx Q Are these copies of the successive correspondence on that matter, 16, 16A and 16B (handing)?

A The answer to your question, sir, is that number 16 here, I did get a copy. I remember seeing this one. But, honestly, I don't remember seeing these two before. I couldn't testify to them (indicating).

MR. GARTNER: All right. I offer 16 in evidence, then, your Honor.

THE COURT: Show it to Mr. Engelhard.

MR. GARTNER: He has seen it.

MR. ENGELHARD: No objection, your Honor.

THE COURT: All right.

(Plaintiff's Exhibit 16 for identification was received in evidence.)

xxx THE COURT: This purports, as I understand it, to be a response to 15, is that right?

MR. GARTNER: Yes, your Honor.

THE COURT: Very well. All right. You may proceed.

Q Mr. Quick, any dispute over interpretation of contracts, such as is exemplified by Plaintiff's Exhibits 15 and 16, is known in the Railway Labor Act parlance as a

minor dispute, is it not?

A That is correct.

Q And, as a matter of fact, do you know whether the union filed grievances over that?

A I really don't know.

Q In the normal course the union would file a grievance, wouldn't it?

A That is correct.

Q And that grievance, under the Act, would be heard and determined by ~~Assistant~~ Board of Adjustment.

A That's one way, yes.

Q Or settled by the parties.

A That's right.

Q But if the parties can't settle it, it goes for compulsory arbitration to the ~~Assistant~~ Board of Adjustment, doesn't it?

A If the union continues it, yes.

Q Or the union might drop it.

A Yes.

Q If they became persuaded that their interpretation of the contract was wrong.

A Correct.

THE COURT: May I ask you something? This is a fairly common thing in the matter of labor-management

relations. There are problems, they are brought to the attention of the respective parties, and many times they are worked out on an amicable basis.

THE WITNESS: Most of the time, yes, sir, your Honor.

Q In the administration of a contract --

A That is correct.

Q -- you try to work them out. If they can't, the union will file a grievance. They go through the steps required under the contract. If they still can't work it out, the union may submit the matter to the ~~Assistant~~ System Board of Adjustment.

A That is correct.

Q And the ~~Assistant~~ System Board of Adjustment will determine the meaning of the contract, isn't that right?

A Correct.

Q Now, that wasn't done --

THE COURT: That is all contained within the provisions of Article XIII of the contract.

THE WITNESS: Girevance procedure, yes.

MR. GARTNER: Yes. It is contained within Defendants' Exhibit A, the ~~Assistant~~ System Board of Adjustment clause.

Q Now, as a matter of fact, in this instance the

record. I am not going to move to strike it.

Were you present, Mr. Quick, in the negotiations between Japan Air Lines and the IAM in July of 1972?

A No, sir; no, sir.

Q In fact, you testified that you didn't enter those negotiations until December 7, 1972?

A That is correct.

Q Isn't that true?

A Yes, sir.

Q So you were not aware of the statement which Mr. Saito had made to the negotiators in July of 1972?

A Don't know anything about it, no, sir.

Q No one ever told you anything about it?

A No, sir.

Q From the union?

A No, sir.

Q Or the company?

A Never heard about it.

Q Never heard about it.

Mr. Quick, did Mr. Ogoshi consult with you before he sent Defendants' Exhibit E to Mr. Peterpaul?

A No, sir. I was on vacation home until October.

Q Do you recall the last mediation session on November 12 and 13 --

A Is what I am saying.

THE COURT: Are you saying the first time the company brought that up, the first time any representative of the company said to you in words or substance, quote, "This is not a bargainable issue," close quote, referring to scope, was when Mr. Kasumi did it and said it on November 13, 1974?

THE WITNESS: That was the first time I have heard it in my entire life of thirty years in the business, on this issue and others, first time.

Q But, Mr. Quick, had you been told before then by the negotiators in these negotiations that they were going to give you an offer on scope?

A No, no, they hadn't told me they would give me an offer on scope.

Q In fact they had told you that they would not give you an offer on scope, hadn't they?

A They never did.

Q They never did?

A Even to this day.

Q Even to this day they have not told you they would not give you an offer on scope?

A That is correct.

Q They have told you they won't bargain about it,

Q Mr. Kasumi, what is your position with Japan Air Lines?

A I am in charge of administration in America.

Q How long have you held that position?

A I came to United States 1970, July 31.

Q July 31, 1970?

A It is four years six months.

THE COURT: I guess that would come out right.

Q As part of your job, is it your duty to act as the negotiator for Japan Air Lines in contract negotiations with the IAM?

A Yes, including.

Q Yes. It is included in your job.

A But not all.

Q You have other duties?

A My job is a very, very broad.

Q Did you participate in the 1972 negotiations which led to the agreement which is the orange book in evidence, the current contract?

A Yes. I participate all the sessions.

THE COURT: In all the sessions.

A All the sessions. But maybe one day or two days not attend.

THE COURT: All but one or two days?

THE WITNESS: Yes. But I don't remember what days.

Q Do you recall that at some point during those negotiations a Mr. Saito came to participate in the conferences?

A He came July 1972.

Q July 1972?

A Yes.

Q Were you in conferences or in mediation at that time?

A Last direct negotiations.

Q Last direct negotiations.

A Yes.

Q Who was present for the union as the chief spokesman?

A Mr. Ogoshi represented the union.

Q Mr. Ogoshi.

A Yes.

Q The man who is in court here.

A That's right.

Q What did Mr. Saito say at the meeting?

THE COURT: Let us find out for a minute, if I can just backtrack, who Mr. Saito is, what position he occupied in 1972.

THE WITNESS: At that time Mr. Saito was in charge, senior vice-president in Tokyo headquarters.

THE COURT: So he came from Japan?

THE WITNESS: Yes, he came from Japan. And also Mr. Abo, A-b-o, came to Honolulu from Tokyo headquarters. He was in charge or general manager of labor relations.

Q These meetings took place in Honolulu?

A Yes. He also came from Japan.

Q I see.

A And also Mr. Sendo, S-e-n-d-e, vice-president, America, also attended.

Q What did these gentlemen, what did Mr. Saito particularly, say to the conference?

A Mr. Saito said, "I came here, and I have heard since January the positions of IAM in the negotiating sessions. And I have received a report from IAM representatives that the main point is scope. So I came here and I am here to tell the Japan Air Lines policies. Because Japan Air Line has had and wants to keep a good relationship with IAM since 1959.

Q Please go on.

A By now, Japan Air LInes has settled six negotiation agreements in the stage of direct negotiations, but I heard this is now a final conference stage, so I came

here." And he says --

MR. GARTNER: If I may interrupt, your Honor, for the moment.

Q Are you saying that Mr. Saito said that up until that time --

THE COURT: I understand what he said. He said that they had engaged in a number of negotiations, they had always reached contracts, he heard that this contract negotiation was --

MR. GARTNER: But the point I am trying to clarify is that they always had reached contracts without going to mediation; that it was in the conference stage. Is that what you mean, Mr. Kasumi?

THE WITNESS: That means direct negotiations.

Q Direct negotiations?

A Without conference.

Q Without going to mediation.

A Yes, that's right.

Q All right.

MR. GARTNER: And this was the last, as I understand what he said, direct conference before it would be --

THE COURT: Yes, I understood that.

Q Please continue.

MR. GARTNER: I don't mean to interrupt, and if

your Honor tells me not to, I won't.

THE COURT: No, you have not inhibited the testimony.

A And he says, "Japan Air LInes is a foreign carrier, so we respect United States labor rules and labor practices and labor agreements. Regarding whether we will continue some station or to open our own ground handling or mechanics work," he said," it is a company disposition. In other words, it is a management right. No obligation to bargain. I am not specialized in that, but I believe Japan Air Lines management can do this. Japan Air Lines doesn't violate any United States laws." And he say the negotiations should be concentrated.

Q Concentrated?

A Yes. On the labor conditions. Because Japan's labor law is made, copied, on United States labor law after second war.

Q After the second war?

A After the second war. So he say he think it is the same.

Q Did you finish your statement or are you looking for a word?

A Yes. That is the main point. And some questions are asked. Mr. Ogoshi say, "That means won't negotiate?"

Q Mr. Ogoshi said, "That means you won't negotiate?"

A Yes, that's right. Mr. Saito says you don't say we open some stations; that is company decision and responsibility. But if we open stations, we will negotiate pay and working conditions there.

Q If the company opens stations by its own decision, they will negotiate the pay and the working conditions for the people that they hire at those stations?

A That's right.

Q Have you told us the substance of what Mr. Saito said at the meeting and what Mr. Ogoshi said at that meeting?

A And Mr. Ogoshi said, "Suppose this agreement will expire after" -- I don't know exactly -- "after some months, Japan Air Lines has no right to open any station." That is what Mr. Ogoshi questioned. Mr. Saito says, "At the present time Japan Air LInes has no open program in our shop program on the five years corporation planning. Of course, to make and plan a long-range program, we will always give you, open or not, we will study all factors, concerning all factors."

Q Consider all factors?

A Yes. There are many factors, the economics of it. So he say about nine or ten factors, et ceteras, included.

Q Was there anything further said on this subject at that meeting?

A And finally Mr. Saito said, "This is Japan Air Lines arrangement, decision on the matters, and they want to continue good relations with IAM. The company situation is not so bright at the present time, but if the future is bright, so please understand our position on the JAL, we will try to avoid layoff. That is a company policy I announce. So finally Mr. Ogoshi say, "I understand, but our proposal is that the scope issue is 90 percent; the other is minor." And Mr. Ogoshi says he expected to hear some good answer from Mr. Saito. "So if we can't settle these matters through direct negotiation, so we will go to mediation." And some people, maybe Mr. Yonemura, asked, "Do you know any right to go to mediation on the issue only of scope?" He says, "I don't know." That finishes it.

Q That was the end of that meeting?

A Yes.

Q Subsequently you did go --

A Subsequently the company applied to the National Mediation Board. Also the union took application to the mediation board.

Q And a mediator was appointed, a mediator was appointed?

A A mediator is very delayed.

Q Delayed.

A Delayed. So we waited until maybe December. Mr. Meredith, he is coming.

Q Meredith?

A Meredith.

Q You were in the courtroom. Was that the meeting to which Mr. Quick referred on December 7 when the first mediation meeting took place?

A Yes. In the National Mediation the first time I saw Mr. Quick; but after, spokesman was Tim Connolly stayed.

Q Tim Connolly was the actual spokesman for the IAM?

A Yes. But Mr. Connolly told us from the negotiation Mr. Quick will take position; but, after, Mr. Connolly took actual spokesman.

Q Do you know what position Mr. Connolly had with the IAM at that time?

A I don't know. Anyway there were three representatives: Mr. Ogoshi -- there were three negotiators, I understand, always. From the International, there was Tim Connolly. After that, we have Mr. Quick, we take his position.

Q Mr. Connolly was the International representative?

A Yes, Grand Lodge there.

Q Did Mr. Connolly say anything at those meetings about the scope issue? Incidentally, when we talk about scope, when you talk about scope, what was the union's demand on scope in 1972?

A They were demanding in Los Angeles and Anchorage.

Q For JAL to hire its own employees?

A In Los Angeles and Anchorage.

Q In place of the contractors that you had in those locations?

A That's right.

Q Incidentally, if I can interrupt the course of the recital at this point, how long had Japan Air Lines had work contracted out at that time in Anchorage and Los Angeles? For how many years had Japan Air Lines contracted out work in Los Angeles and Anchorage?

A Since the beginning of operations.

Q And when was the beginning of operations?

A About fifteen years, more than fifteen years.

Q More than fifteen years ago.

THE COURT: Just a moment now. The witness says more than fifteen years ago, which would put it beyond 1960.

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: Maybe thirteen or fourteen years.

THE COURT: Thirteen or fourteen years. Yes, I think that might be more like it. Plaintiff's Exhibit 7, which I have in front of me, appears to indicate that the initial service to Los Angeles via Honolulu was inaugurated in May of 1959; the initial stopover in Anchorage, which would have been, I guess, on the Tokyo-Seattle run, also in 1959, in June, is that correct?

Q Mr. Kasumi, is that correct? Have you heard what the Judge said?

THE WITNESS: Yes.

THE COURT: Thank you.

And just let me follow up on that. Is it your testimony that from the first service in 1959 all of the ramp and other personnel at Anchorage and Los Angeles were people who were working for others with whom the air line had contracts?

THE WITNESS: All contracted out.

THE COURT: All contracted out.

THE WITNESS: Except it left stores out.

THE COURT: Yes, it left stores out because, I know, there were three storekeepers.

All right. I have it. Thank you.

BY MR. GARTNER:

Q Mr. Kasumi, in Los Angeles, which company had Japan Air Lines contracted with to do its mechanics work?

A United Airlines.

Q And do you know whether the United Airline mechanics are represented by any union?

A The same union, IAM.

Q They are represented by the IAM, too, aren't they?

A Yes.

Q And those men have been working in Los Angeles

doing Japan Air Lines contracted out work since 1959.

A Yes.

Q Now, getting back to December 7, 1972, Mr. Kasumi, you say Tim Connolly was the actual spokesman for the IAM at that first mediation meeting. Did he say anything about this scope demand, that you hire your own employees in Anchorage and Los Angeles?

A At that meeting, the company say --

MR. ENGELHARD: Which meeting are you referring to now?

MR. GARTNER: December 7, 1972, the first mediation meeting for the old contract.

Q I'm sorry, Mr. Kasumi.

A The company want to review all open issues.

Q The company wanted to review all open issues.

A And to discuss and reach agreement as soon as possible. We already discussed actually thirty days --

Q You had already, you say, discussed thirty days before the first mediation meeting.

A No; in direct negotiations.

Q In direct negotiations, yes, before the first mediation meeting.

A But Tim Connolly say without scope we can't -- we couldn't have a meeting.

Q You couldn't have a --

A Yes.

Q -- meeting?

A Yes; negotiation. They couldn't continue negotiations.

Q I see.

A So I remember --

Q You mean he refused to continue meeting without --

MR. ENGELHARD: Objection.

THE COURT: Yes.

A So he requested release of mediation service. That means mediation sessions he want to stop and go home.

Q I'm sorry. Go to what?

A Go to headquarters National Mediation Board.

Q Oh. Go to Washington, to the National Mediation Board?

A Yes.

Q To the headquarters of the National Mediation Board.

A Yes. This meeting was useless, he said.

Q Please slow down. You were doing fine if you go slowly. If you go slowly, I think we'll all understand you better.

A The union wanted a proffer of arbitration by the

Mediation Board.

Q He said that at the first mediation meeting?

A Yes. That is a very unusual point.

THE COURT: Mr. Connolly said this?

THE WITNESS: Yes.

Q Yes. And then what happened?

A Company say, "We want continue negotiations. So, if this time is not so good, we want to reschedule next year."

Q That would be 1973.

A Yes, because that was the Christmas season in New York.

Q That meeting was taking place in New York?

A Yes.

Q Then what happened at that meeting?

A Mr. Meredith say, "National Mediation don't think that the steps of proffer of arbitration. Even if scope clause is not agreed, the other remaining issues should be discussed."

THE COURT: Who said that?

THE WITNESS: Mediator Mr. Meredith.

Q And did he schedule another meeting for that purpose? Or what happened?

A There was a caucus.

MR. ENGELHARD: Absolutely we do.

THE COURT: Well, I don't. Because as far as the Court is concerned, I wouldn't care what the parties had discussed prior to the agreement. Much of what they discussed merged into the agreement. I read the agreement, and I would consider that the issue of scope is permissively bargainable, for a very simple reason. There is nothing illegal or inherently improper about scope. But it does seem to the Court quite clear that whether or not scope is bargainable does not depend on the prior bargaining track record of the parties, but rather whether scope comes within the area which you bargain on, which is rates of pay, rules and working conditions. In the Court's judgment there is no way this issue, as near and dear as the union holds it to itself, comes within rates of pay, the rules or working conditions. You show me how, and I will listen.

MR. ENGELHARD: If your Honor please --

THE COURT: Am I not limited to those as the bargainable areas under the Act -- rate of pay, rules, and working conditions?

MR. ENGELHARD: The Act further says, your Honor, that all disputes between the parties -- used the words "all the disputes, " I believe.

Be that as it may, your Honor, I believe that in

any event the question of what is a working condition is ingrained -- or the question of scope is ingrained in what is a working condition.

THE COURT: How is this a working condition?

MR. ENGELHARD: Because a person being laid off, temporarily or permanently, is in effect changing his working condition.

THE COURT: Is it a working condition to demand that there be thirty-five additional jobs made available to union members? Does that come within rates of pay, rules and working conditions?

MR. ENGELHARD: Your Honor, I respectfully believe that it comes certainly within the realm of working conditions. We may differ, we certain do apparently, as to that; but we believe it does.

THE COURT: By no stretch of the imagination does the Court see that that comes within working conditions. You are putting the personnel at a completely different location. They are not even working alongside of others already employed by the company, as I understand the way this is to work. I further don't understand, if I am correct on this, how the union wishes to put its own people in, in a manner which I would suggest would eliminate the jobs of some other members of the union who are presently working

S H I G E O K A S U M I, resumed.

THE COURT: Mr. Kasumi, you are now returning to the stand and you will continue your examination.

DIRECT EXAMINATION CONTINUED

BY MR. GARTNER:

Q If you will turn your mind, Mr. Kasumi, back to February, to March, 1973, did the question of scope, union scope demand, at that time come up in the course of those meetings?

A Yes.

Q Who brought it up and in what respect? Who from the union?

A Sometimes Mr. Quick, sometimes Mr. Ogoshi.

Q What did they say or what did each of them say, if you can tell us?

A Scope he just said is one of the main issues in the union.

Q Is a main issue in the union?

A Yes.

Q What was the company's response and who replied to that?

A Mainly Mr. Yonemura replied, and sometimes I replied, but the company says, since Mr. Saito's announcement, usually we say no change. That means Mr. Saito's announcement

is the position. And sometimes he says it is a company responsibility.

Q It is a company responsibility.

A That's right. And sometimes Mr. Ogoshi, I remember, two or three times he asks us regarding scope. "Do you change? How about scope position?" "No change in Mr. Saito's position." Mr. Ogoshi sometimes ask. We say no change. So I believe Mr. Ogoshi clearly understand our company's position.

MR. ENGELHARD: Objection.

THE COURT: Strike what he just said, about someone understanding the company's position.

Q Just say, Mr. Kasumi, what was said, not what you believe what they said and what you said.

A What?

Q Have you finished your statement of the conversations during those negotiations? Do you have anything to add to the conversations?

A No.

Q Nothing to add. All right. Mr. Kasumi, did there come a time when the mediator made a proposal to the parties?

A Yes. Mr. Phipps come in.

Q Mr. Phipps was the mediator --

A Yes.

Q -- in 1973?

A 1973. Again, changed. Mediator changed.

Q The mediator changed from Mr. Meredith to Mr. Phipps?

A Yes.

MR. GARTNER: May I have that marked Exhibit 17 for identification, please.

(Plaintiff's Exhibit 17 was marked for identification.)

Q Mr. Kasumi, can you tell us what this is, Plaintiff's Exhibit 17 for identification?

A Mr. Mediator sometimes comes to company and he says union says --

MR. GARTNER: Objection.

Q Don't tell us what the mediator said. Tell us what this paper is.

A This I received from Mr. Phipps.

Q You received a copy of that from Mr. Phipps?

A Through Mr. Yonemura.

Q Through Mr. Yonemura?

A Yes. But I was there.

Q You were there?

A Yes. I saw.

THE COURT: But he handed it toyou, is that it?

THE WITNESS: Yes.

THE COURT: Did he say anything when he handed it to you?

THE WITNESS: I can't go. I am sitting.

MR. GARTNER: Did he say anything when he gave it to you?

THE WITNESS: Just as I say, I received that copy. That is all I am saying.

Q But when Mr. Phipps handed it to you, did he say anything to you?

A Oh, he saying scope in the company doesn't make scope closed. They want their position, or they go to strike. Strike is very, very serious. Maybe Japan Air Lines has no experience, he said.

Q Was someone from the union with you when Mr. Phipps said that?

A No.

Q Can you tell us what date, if you recall, you received this from Mr. Phipps? Do you understand my question?

A Yes. Very great part. Maybe -- I don't exactly know the date. But in March, not February.

Q It was in March. Was it on the same day that you finally came to an agreement with the IAM?

A At that time we made a record in Japanese only. So it needs translation time.

Q Do you have those Japanese records?

MR. GARTNER: I am sorry, your Honor, but this is where it leads.

Q Do you have those Japanese records? Are they in Tokyo, or are they in New York?

THE COURT: Or have they been thrown away?

Q Do you recall?

A I don't know exactly to find out,even. It takes time to find out.

THE COURT: In any event, you do not have them here?

THE WITNESS: I have them.

Q You don't have them here?

A Yes, I don't have them here.

THE COURT: What is the best you can do from your own memory to tell us when the mediator gave you this handwritten material which is now Exhibit 17?

THE WITNESS: The union insisted --

THE COURT: I just want to know when you got that.

THE WITNESS: Insisted no decision-- near end.

Q It must have been close to the end?

A Yes, near end. But we say we want to continue

good relationship. So we want to continue negotiations. But Quick says this strike situation is a very, very serious one for both sides. But we have mediation. National Mediation is function to make settlement peacefully.

Q MR. Kasumi, does that help you recollect when you received the document, bearing in mind that the appendix, the letters setting up Appendix D and Appendix E, were dated March 20?

A Yes.

Q Was it ten days before that or twenty days before that or two days before that, that you received that document? Do you have any recollection? How soon after you received that document --

A It would be a whole week or ten days.

Q A week or ten days?

A Yes.

Q A week or ten days before March 20?

A And I don't know what happened, but anyway that is that we don't discuss on the table something. And then negotiations started.

Q You did not discuss on the table what when the negotiations started?

A After that, I received, then negotiations again started, begin.

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Q Oh, after you received this, the ngotiations started again?

A Through March 20.

Q Through March 20. And on March 20 you reached agreement?

A On one day, March 19 maybe, we have at least tentative agreement with the union.

Q On what? A tentative agreement on all the other terms?

A No, except Appendix D, on some part-time close. Union is demanding part-time that two or three stay open. But union says, "We will go to ratification. Appendix D is not our demand, so we can't make yes recommendation. We will go to no recommendation.

Q In other words, they said Appendix D was not what they had asked for?

A Yes.

Q So they were not going to recommend its acceptance?

A Yes.

Q And they went to a vote without recommending acceptance?

A Yes.

Q Is that right?

A Right.

Q All right.

A We never discussed Appendix D.

Q You never discussed Appendix D?

A No. Or questions from union side.

THE COURT: Appendix D, as I understand it, was suggested to the parties by the mediator, is that right?

A Right.

Q All right.

A But union understand company position, package, so we will go to ratification.

MR. ENGELHARD: Objection.

THE COURT: I will strike everything after the response to my question, which was that Appendix D was proposed by the mediator.

Q What about Appendix E? What about Appendix E?

A Appendix E means job security.

Q It is no layoff?

A No furlough.

Q No furlough. All right.

THE COURT: Who proposed Appendex E?

THE WITNESS: The company. We said --

THE COURT: That is all right. You have answered the question.

MR. [illegible]GELHARD: No objection, your Honor.

(Plaintiff's Exhibit 25 for identification was received in evidence.)

Q Now, Mr. Kasumi, on that date, January 18, 1974, was there oral discussion about the union's demands?

A Yes.

Q What, if anything, was said with respect to the union's scope demand?

A Company say company position is no change, as Mr. Saito say in July session 1972.

THE COURT: Well, I think that we've gone off again. I have some difficulty in ascribing any probative value to an answer which is prefaced by "company said."

You are talking about an oral discussion, and it seems to me we ought to identify--

MR. GARTNER: I'm sorry.

Q Who said that?

A Mr. Yonemura.

THE COURT: When was this?

THE WITNESS: January 18th.

THE COURT: And, again, could you just tell me what Mr. Yonemura said and to whom he was speaking?

THE WITNESS: To union.

THE COURT: Who was there from the union?

THE WITNESS: That's right.

THE COURT: Who?

Q Who was there representing the union?

THE COURT: What people?

Q What people?

A Mr. Ogoshi.

THE COURT: Mr. Ogoshi.

THE WITNESS: Yes.

Q Was there anybody else there?

A All committee members.

THE COURT: Was Mr. Quick there?

THE WITNESS: Mr. Quick, I think he not there.

Q You think he was not there. All right.

What did Mr. Yonemura say?

A About scope--

THE COURT: Yes.

A (Continuing)--company position is no change, as Mr. Saito say in July meeting in 1972.

Q Did Mr. Yonemura specifically use Mr. Saito's name?

A Yes.

Q All right. Now, as that session of direct negotiations--

THE COURT: Excuse me. Could I just ask one

demand on January 31st?

A January 31st we don't discuss about scope clause.

Q Was there anything said about the scope clause on that day or the preceding day?

MR. ENGELHARD: Objection, certainly as to that day. It has been asked and answered, your Honor.

MR. GARTNER: No. It is a different question, your Honor.

THE COURT: I'll allow it.

A Last day, January 15, 1975 we discussed a little time.

Q I'm asking about January 30th or 31st. Was anything said--not discussed but said--about the scope clause, the scope demand? And who said it, if anybody said anything?

A We asked the union go to ratification, but the union position--the union say--

Q Who said? Who said?

A Mr. Quick say union position is the same regarding scope.

Q Is the same.

A Same.

Q What else--I'm sorry.

Is that the whole conversation that you recall?

A And Mr. Quick say Court case in New York is trouble to reach agreement at this time.

THE COURT: Let me hear the question and the answer, Mr. Reporter, please.

(Record read.)

Q Mr. Kasumi, when you asked the union, when you asked Mr. Quick, to go to ratification, was there any response?

A Yes.

Q What did he say?

A Union has a Court case, so this time request recess.

Q One other question, Mr. Kasumi.

And I want to be very careful and particular about this question, your Honor, without waiving any privilege.

In 1972, did Japan Air Lines ask a legal opinion or did Japan Air Lines consult American counsel about the need to bargain or not to bargain about the union's scope demand? And please just answer yes or no.

MR. ENGELHARD: Objection.

THE COURT: Overruled.

A We did.

Q You did. Can you tell us what the date of that

consultation was?

A That was June 1972.

MR. GARTNER: All right. I have no other questions.

XXX CROSS EXAMINATION

BY MR. ENGELHARD:

Q Mr. Kasumi, if you don't understand any of my questions, just please say so and I'll try to rephrase it.

A Yes. I understand.

Q You stated that Plaintiff's Exhibit 30 were the IAM proposals given to Japan Air Lines on January 23, 1975.

I show the witness my copy.

A Yes, sir.

Q And there are six such proposals, aren't there?

THE COURT: I don't know that he can count the sixth one, counsel.

A Yes, six.

B2 THE COURT: If you want to say they are numbered six, yes.

MR. ENGELHARD: There are six numbered.

THE COURT: The sixth item is more of a summary, I suppose, rather than a firm proposal, as the others are.

Q Did you in any other job that you may have had have the services of the National Mediation Board? I will withdraw the question. Perhaps I can clarify it.

Before you worked for Japan Air Lines--

A Yes.

Q --did you ever work for any other airline or a railroad?

A Me?

Q Yes. In the United States.

A In the United States?

Q Yes.

A No. Before coming to the United States, I was in labor relations department in Tokyo. That's all.

THE COURT: Was that in the department of Japan Air Lines?

THE WINTESS: Yes. Japan Air Lines.

Q Did you ever work for anyone other than Japan Air Lines in the airline industry or the railroad industry?

A No, sir.

Q Mr. Kasumi, if the plaintiff, if the Japan Air Lines, were to have agreed with the union regarding scope, how many new employees would you estimate would be required to fill those positions?

A We said estimated 213 people.

MR. ENGELHARD: I was not quite sure. The only problem is that he refers in these -- that was my recollection -- to the damages, for example; he refers to the economics. That is the reason why I pursued it.

THE COURT: He refers in 18A at page 6 to the hiring. He estimates that they would have to hire approximately 235 new employees, and he outlines the services performed by others. He speaks in paragraph 28 of that exhibit, on page 20, about eight million dollars in new facilities and equipment.

MR. ENGELHARD: That is the point, your Honor. That is the only point.

THE COURT: And of course I gather that you say that you want to make a comparison between the capital investment that they are talking about here and the present contract costs which you might want to capitalize in some way. I gather that is the basic argument you have.

MR. ENGELHARD: If they want to withdraw those statements --

MR. GARTNER: We have already withdrawn the figures, your Honor, in connection with Mr. Chen's testimony, and I am willing to withdraw the figures with respect to Mr. Kasumi's testimony, except that counsel has persisted in getting a figure out of him and now I am going

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to move the Court to restore the figures, at least with respect to the Los Angeles operation.

MR. ENGELHARD: I would be willing to withdraw that, then, if you so wish, so you have --

MR. GARTNER: I will withdraw the figures; you withdraw your figures.

MR. ENGELHARD: I will withdraw it.

MR. GARTNER: Because I don't think the figures are comparable in any way, your Honor.

THE COURT: No. Actually it is an apples and oranges situation, frankly, gentlemen.

MR. GARTNER: It is.

THE COURT: And I wondered about that when I first heard them.

If you are both prepared -- and I am not going to force you beyond what has been said in the record already -- but if you are both prepared to withdraw your figures, I will hear you on that.

MR. GARTNER: I am prepared to withdraw the figures, your Honor.

MR. ENGELHARD: If the plaintiff withdraws its figures relating to capital investment necessary to implement the union's demands, we are willing to withdraw the testimony of Mr. Kasumi as to the one-million-dollar figure

charged by Mercury.

THE COURT: And you are prepared, of course, to withdraw your pending question relative to the contract with United Air Lines.

MR. ENGELHARD: That is absolutely correct.

MR. GARTNER: I hope you are also prepared to forget the figure.

THE COURT: Yes. The figure elicited here was elicited only in this case and will not, and I direct that it not, be used by any person in this room or outside of this room in any other proceeding.

MR. ENGELHARD: I have no further questions of the witness.

Thank you, Mr. Kasumi.

REDIRECT EXAMINATION

BY MR. GARTNER:

Q Mr. Kasumi, I know we have taxed your memory on many occasions. Can you tell us who was present representing the union during the first meeting -- let me withdraw it.

Were you present at the first meeting in direct negotiations in November 1973?

MR. ENGELHARD: Objection.

A Yes.

MR. ENGELHARD: We have gone over this, your

JAPAN AIR LINES

vs. 75 CIV 166

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

February 7, 1975
9:30 a.m.

(Hearing resumed.)

THE COURT: You may proceed, Mr. Gartner.

MR. GARTNER: Thank you, your Honor.

I call Mr. Wayne Kuramoto.

W A Y N E K U R A M O T O, called as a witness by the plaintiff in rebuttal, being first duly sworn, testified as follows:

MR. GARTNER: Please mark this as Plaintiff's Exhibit 32 for identification.

(Plaintiff's Exhibit 32 was marked for identification.)

DIRECT EXAMINATION

BY MR. GARTNER:

Q Mr. Kuramoto, can you identify Plaintiff's Exhibit 32 for identification, please (handing)?

A These are minutes that I took of the negotiations on January 18th, 1974.

Q Between JAL and IAM?

A Yes.

MR. GARTNER: Your Honor, I offer the first page of this in evidence.

THE COURT: Why not the whole thing?

MR. GARTNER: Because I am offering it as rebuttal. I am willing to offer the whole thing, but I don't want to clutter the record.

THE COURT: Show it to your adversary.

MR. GARTNER: It is only the statement on the first page that I think is relevant.

I am showing Mr. Engelhard the whole thing.

THE COURT: Any objection, Mr. Engelhard?

MR. ENGELHARD: Yes, your Honor.

THE COURT: What is your objection?

MR. ENGELHARD: There is no basis, foundation, for admitting this into evidence. The witness has testified and it was unnecessary, apparently unnecessary, for him to use any other documents for his recollection.

MR. GARTNER: It is not offered as a recollection, your Honor. This is offered as a contemporaneous record, not as an aid to recollection.

THE COURT: Well, you've got two alternatives, it seems to me, on an offer such as this, Mr. Gartner. I think you would be up on past recollection recorded, although

MR. GARTNER: They are records of previous meetings, your Honor. I am only offering these.

THE COURT: You say you are offering the complete record of the January 18, 1974 meeting?

MR. GARTNER: Yes, your Honor.

MR. ENGELHARD: I would suggest the entire document be introduced.

THE COURT: It will be received. I would like the witness, however, to read to the Court that portion of the exhibit to which counsel wishes the Court to pay particular attention.

XXX (Plaintiff's Exhibit 32 for identification was received in evidence.)

BY MR. GARTNER:

Q Would you read, please, Mr. Kuramoto, starting from the beginning down through the statement of Mr. Yonemura, the first statement of Mr. Yonemura?

A "Commenced at 10:00 a.m. Ogoshi asked if company has manhours figure of contract out work at LAX. Quick walked through LAX FF building"--

Q What does "LAX' stand for?

A "LAX" is the code for Los Angeles. "FF" refers to our cargo building.

THE COURT: Let me have the Reporter read back

to me what you read so far as I will follow it now with that interpolation.

(Record read.)

A (Continuing) "Talked with Mercury Company. Found that at times as much as 40 men working for JL"--which is JAL--"average 20 to 25. IAM attempting to organize Mercury.

"Yone," which refers to Mr. Yonemura, "no plans to man LAX. Goes back July 19, 1972 when Mr. S. Saito addressed the group. It is company policy to determine own handling based on costs, budget and so forth. In Tokyo and other places, other company handling ramp, although JL has interest in the company."

MR. GARTNER: All right. Thank you.

I have no other questions of Mr. Kuramoto.

MR. ENGELHARD: No questions.

THE COURT: Thank you, Mr. Kuramoto.

(Witness excused.)

MR. GARTNER: At this point the plaintiff has completed its rebuttal testimony, your Honor.

THE COURT: Very well. We will proceed now with any surrebuttal, if any, from the defendants, and then I expect both sides to rest.

MR. ENGELHARD: Mr. Quick, please.

Q Wasn't the third term that the union would accept all of the company's proposals, provided the company accepted all of the union's proposals, and if there was conflict between the two, the present agreement would control?

A That very proposal was made sometime, and it could have been right there. I was about to say United, but United had to sever at that point and I don't think we would buy a pig in a poke. I think you are right.

MR. GARTNER: I have no further questions, your Honor.

MR. ENGELHARD: No further questions, your Honor.

THE COURT: Mr. Quick, will you just wait a moment. The Court has a couple.

Mr. Quick, directing your attention to the scope proposals, I place in front of you Defendants' Exhibit F, and I would direct your attention particularly to items 2, 3 and 4.

THE WITNESS: Yes, sir.

THE COURT: Those were the union's openers in September of 1973. Would you tell me what the union's position was on each of those items at the time the Court signed a temporary restraining order on January 22, 1975?

THE WITNESS: That is, 2, 3 and 4 or 2 and 3?

THE COURT: No, take 2, 3 and 4, because I think 1 can be left out.

THE WITNESS: Yes, sir. The union's position on that date, sir, your Honor, on number 2, was as it states here, and we had given them a chart with the phase-out-- our proposed phase-out dates. And this is for all stations other than Honolulu.

In other words, we have been--

THE COURT: Honolulu did not have any subcontracting at any time that we would be talking about, as I understand?

THE WITNESS: No, every classification was covered, and working people in Honolulu. We wanted that same plan put into effect everywhere. And that was our proposal on that date.

THE COURT: The document that you say that you gave the company, which sets all this out, do we have that in evidence in this hearing?

THE WITNESS: Yes, sir.

THE COURT: Let me find it, then.

Does counsel know the number of the exhibit to which the witness makes reference?

I have one in front of me now, Plaintiff's

Exhibit 13. Is that the one you refer to?

THE WITNESS: This is the one, yes, sir.

THE COURT: I have handed that to the witness.

THE WITNESS: This was our last written proposal to the company. However, we had been all over the map on the scope trying to get at least something more than we have.

THE COURT: In other words, what you are saying is that you came around on a circle, bargaining on scope continuously, and although the path may have been around, this was the final union proposal on paragraph 2.

If I am wrong, just tell me.

B2 THE WITNESS: Well, this was our final written proposal. We were not able to reduce this, because I didn't make a counter. It's like the 20 per cent. We could come down, we did come down, we are now on 15 per cent, because they made an offer.

If they made an offer, then we could move. That is our number 2, sir.

THE COURT: Thank you.

THE WITNESS: And then number 3 proposal on our opener was copied from another contract. Let's see now. It says number 3--the first part of that, your Honor, is similar to our Appendix D now, the paragraph in D, about

"positions will not be removed."

THE COURT: So you want to retain that.

THE WITNESS: Want to retain that. And I might skip down to 4, if you will allow me.

THE COURT: Yes. No layoff.

THE WITNESS: And say that is E.

THE COURT: That is E.

THE WITNESS: To retain E.

THE COURT: 4 is to retain E. Not to add to it but to retain it.

THE WITNESS: Yes. Now, those two letters they have refused to renew.

THE COURT: Stop there for a moment, because I am--

THE WITNESS: Page 68.

THE COURT: Yes. I am referring to E. Now, you say to retain E. I had the impression from prior testimony that you wished to actually change E to eliminate--

THE WITNESS: 8.

THE COURT: B-8.

THE WITNESS: Or clarify.

THE COURT: What is the union's position now relative to 8?

THE WITNESS: Well, our position now--

THE COURT: At least as of January 22nd.

THE WITNESS: Yes, sir. --is to either remove 8 or clarify it, because the two parties have different interpretations. And we think now is the time to do it rather than arbitration, after someone is laid off. It says, "because of circumstances beyond the company's control." We thought that was spelled out in the first 7.

THE COURT: But you would be willing to clarify it if the parties could sit down and work it out?

THE WITNESS: Oh, yes.

THE COURT: Now, we will go back, then--

THE WITNESS: To the last half of 3.

THE COURT: --to 3, yes.

THE WITNESS: All right. Now, that has to do with at least half of the lead mechanics at Honolulu. Those jobs were not bulletin, and they brought people from what they call home office, to have the special J, CAB license, because a lead has to have a license.

And, we maintained that they should bid those jobs, take the successful bidders, our people, to Tokyo, and train them.

As I understand it, they did that about 15 years ago, and no one wanted to go. And so they brought those people in. And we think now is the time to try it

again. And the last day of our talks they agreed to do that.

So, then, what we are talking about is 3 and 4, which is in the contract now, and they have agreed to the last half of 3. So the real contention, actually, is 2.

THE COURT: Let us look at 3 again. You say that 3 is pretty much now in agreement?

THE WITNESS: Well, if we are going to agree to take it out, that D and E will remain anyhow. But we wanted to discuss it and leave it in. So don't see a lot of trouble there. But that is our problem right there.

MR. GARTNER: I suggest that the Court and the witness are conducting a very interesting colloquy on the legal meaning of various terms and--

THE COURT: If you are concerned about the Court's accepting the witness' testimony on the legal meaning of the terms, I suggest you allay your confusion.

MR. GARTNER: All right, I will accept the Court's suggestion. Thank you.

THE COURT: Very well. But I want to focus on what we have here.

You are saying that the nub of the problems remains with paragraph D, which in your opener read "amend

to provide that during the life of this agreement, the company shall phase out the contracting of all work covered by this agreement and employ its own personnel to perform such work."

That was the union's opener.

THE WINTESS: Yes, sir.

THE COURT: What was the union's position as of the time the Court signed the restraining order on January 22, 1975?

MR. GARTNER: Respectfully, your Honor, that question has already been answered twice.

THE COURT: Yes. It is going to be answered a third time, because it happens to be the nub of this matter, and I have listened to everyone else go around Robin Hood's barn.

MR. GARTNER: Thank you, your Honor.

THE COURT: I am asking you again. I have asked you. I want to be certain it is in the record, it is by the Court, and I have a response by the witness. This goes to the Court's conception of the basic problem that I am faced with in the case.

THE WITNESS: The answer to your question, sir, is that on 1/20/75 the union made a proposal, which is Plaintiff's Exhibit 13, at which we set out a schedule of

our proposal, which is in accordance with our original proposal, except that we extended a year beyond the date of what we propose as the duration or life of the agreement.

And even the company did not propose a life of the agreement to go that far. Thus, at any rate, there is a schedule there and that is our proposal as of the 20th, sir.

THE COURT: Now let ask you this: Can you tell me, looking at the proposal, how many jobs the proposal intends to cover as of July 1, 1975; January 1, 1976; and July 1, 1976, which appear to be the three effective dates?

THE WITENSS: Yes, sir. Our research and review of the matter shows that at Los Angeles ramp and cargo on 7/1/75 would be approximately 30 jobs. We come to that conclusion by counting the people who are doing the work of the other company.

At JFK, passenger service, ramp people, on 7/1/75 would be 16 jobs. And we counted 16 allied people. There were 13, with three days off.

THE COURT: So your first stage has in mind how many employees, or have you not finished yet?

THE WITNESS: No, that is all for that period.

THE COURT: All right. 46 jobs.

THE WITNESS: Yes, sir.

THE COURT: 30 at Los Angeles and 16 at JFK.

THE WITNESS: Yes, sir. And that particular phase would not involve equipment as we understand it, from our survey.

MR. GARTNER: I object, your Honor.

THE COURT: You can examine him later on this.

MR. GARTNER: It is not responsive to anything.

THE COURT: I know it is not, and I will strike it because it was not responsive.

THE WITNESS: I am sorry, sir.

MR. GARTNER: Thank you.

THE COURT: How many employees would you propose adding on January 1, 1976?

B3 THE WITNESS: At San Francisco, plant and ground equipment mechanics would be three on 1/1/76. And the same thing at Los Angeles, plant and ground equipment mechanics. And the same at JFK. And the same at Anchorage. Three people.

THE COURT: Or a total of 12 people.

THE WITNESS: Yes, sir.

THE COURT: All of whom are now employed by subcontractors or contractors.

THE WITNESS: Yes, sir.

THE COURT: Is that correct?

THE WITNESS: Yes, sir.

THE COURT: And we go on to the date July 1, 1976.

THE WITNESS: Now--

MR. GARTNER: Your Honor, may I call the witness' attention to the fact that on 1/1/76, in Anchorage, it is the ramp and cargo classification which is involved, not the plant and ground equipment. I think the eyes slipped.

THE COURT: Is that correct, sir?

THE WITNESS: That is correct. I am sorry. Thank you.

MR. GARTNER: Thank you, Mr. Quick.

THE WITNESS: Ramp and cargo would be 17 people in Anchorage.

THE COURT: 17 people?

THE WITNESS: Yes, one more than you have. 17.

THE COURT: I see. So that actually the total number of employees who would be added on January 1, 1976, would be 23. 17 at Anchorage--

THE WITNESS: 26.

THE COURT: 26. I have counted. Let us move now to July 1, 1976. We will start with San Francisco, aircraft maintenance people.

THE WITNESS: All right. Aircraft maintenance,

there are a total of eight people, mechanics.

THE COURT: Now Los Angeles.

THE WITNESS: Eight people. JFK, aircraft maintenance, eight people.

Aircraft maintenance at Anchorage, 12 people, 12 mechanics. They have more flights.

7/1/76, aircraft mechanics, 12 mechanics. And three stores. We have three stores at every station already.

THE COURT: And how about plant and ground equipment?

THE WITNESS: Three.

THE COURT: That would be a total of 40 employees added on that date, is that correct?

THE WITNESS: Yes, that's correct. I visited every station and surveyed the operation--

MR. GARTNER: I object, your Honor.

THE COURT: I have not asked you a question.

As I understand it, that would come to 112 new employees of JAL by July 1, 1976, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Am I also correct that none of these people are now employed by JAL; that the people who do this work are all employed by subcontractors or contractors, the work is contracted out, at the various locations?

THE WITNESS: That is correct.

THE COURT: Finally, I would ask you if any of the people who would be doing this work, beginning on July 1, 1975, have ever done the work as employees for Japan Air Lines or, as far as you know, has this work been contracted out by the airlines up to this date?

THE WITNESS: The latter is true. It has been subcontracted.

THE COURT: I have no further questions.

Since the Court has made inquiry of the witness, I will permit counsel to inquire on the subjects which the Court has taken up with the witness.

MR. GARTNER: Thank you, your Honor.

CROSS EXAMINATION (Continuing)

BY MR. GARTNER:

Q Mr. Quick, in arriving at your estimate of the number of people that would be necessary to fill these jobs, in the various stations that the union is asking for, have you taken into account the need to hire supervisors or other managerial personnel to supervise the--what shall I call them--the line workers and to supervise the equipment and facilities that these people would be working with?

Have you taken it into account? That is all I want to know.

A Yes, sir.

Q And your estimate includes those people?

A No. You already have those people.

Q Oh, you say we already have those people.

A Yes, sir.

Q In other words, we have enough supervisors and managers, in your estimation, to handle another 112 line people in all these stations?

A In my estimation, as you say, I think you are right, yes, sir.

Q But your figures of 112 does not include any supervisor or management personnel?

A It does not, no, sir.

Q In reaching your figures, Mr. Quick, have you taken into account the requirements which are imposed by the JAL contract on the way in which shifts can be formed and the hours that line people can work?

MR. ENGELHARD: Objection, your Honor.

THE COURT: If the witness can answer the question, I will let him answer it.

A No, sir. I just counted the people who are doing the work.

Q You just counted the people who are doing the work?

A And talked with the leads. And talked with the leads at Anchorage, all over.

Q And those people, Mr. Quick, in fact do work for other airlines than JAL, don't they?

A No, sir. Not the mechanics on JAL. United mechanics bid those jobs--and I know them, having represented them for a long time myself--and they work only for JAL.

Q Mr. Quick, I am not asking you whom you know or where you got your information.

THE COURT: I will just take the answer. The witness has stated--

Q I am asking you of your own--

THE COURT: Please, counsel. The witness has stated of his own knowledge that he knows that the mechanics would work on the aircraft at these locations bid for the jobs and only work for JAL.

If you want to follow up on that question on cross examination, you may do so.

MR. GARTNER: Thank you.

Q Do you know of your own knowledge whether the ramp employees and the stores employees and the plant and ground equipment employees work exclusively for JAL or for other airlines?

A Other airlines as well.

Mr. Richberg's appearance previously. I think that was in 1926. But now he is talking, footnote 17, page 582:

"The Congressional debates over the Norris-LaGuardia Act support a construction of that Act permitting Federal Courts to enjoin strikes in violation of the Railway Labor Act in appropriate cases."

And he does say previously, as I indicated, that we should look at this on a case by case basis.

I suggest that the Court does have jurisdiction and will look at this case on its facts to determine whether that jurisdiction should be exercised.

You may conclude on this point, if you will, and then get on to your next one.

MR. ENGELHARD: I think I have said enough about it and I think there is enough in the record as to our position on jurisdiction.

THE COURT: I think you always maintained that the Court lacks jurisdiction. So I suggest you now have an argument, but it is one which you will have to repeat again in the Court of Appeals or back in the Supreme Court.

MR. ENGELHARD: We respectfully disagree.

THE COURT: If it is going to be changed, I think it has to be changed in the Supreme Court. But that is my comment and I will not interrupt you further.

missing, and that was the answer as to that proposal.

THE COURT: I would suggest there was an answer and it was basically a negative one. The proposal, as I recall in Plaintiff's Exhibit 30, which was denominated 4, was "negotiate on scope rule if final Court decision permits."

B6 And as I relate it to the response, which is Plaintiff's Exhibit 31, I would look to the third item down: "regarding Appendix D issued 11/12/74, no change."

So I think there was a response on this, which, as I read it, was: "We believe that, as of this moment anyway, scope is not negotiable."

I don't say that that indicates they will never change their position, and I do note that the union proposal was "if final Court decision permits," but I suppose it is premature for the company to say "Yes, we'll agree." I see your argument and I don't completely disagree with it. I do see the point that you've made.

MR. ENGELHARD: Thank you.

If your Honor please, without--

THE COURT: Of course, let me add one thing. As you gentlemen know, I am not hesitant about telling you my views, and I did indicate to counsel, and I think their clients were present on at least one or two occasions

when I indicated it, that as the proceeding progressed, I was forming the view, which I again express now, that this particular aspect of scope is not a compulsorily bargainable issue.

So that I think the record should be clear that I did express myself on that.

I know I always tell juries, "Don't make up your minds until the case is concluded." But I do think it is helpful to counsel to indicate how I am thinking. With the record now closed, I would reiterate that point.

MR. ENGELHARD: I understand that, and my remarks were made in light of your previous remarks made to counsel, your Honor.

I just wish to mention that the papers in support of the motion, the argument initially made by Mr. Gartner in part, not totally, and even your own remarks earlier in the proceedings, your Honor, laid stress on the enormous amount of money or capital investment that would have to be made to implement the union's proposal on scope.

I think we have eliminated certainly a large part of that, because there isn't any evidence with regard to the amount of money that it would take to implement the scope proposal of the union. And I think that some of the early cases cited by Mr. Gartner stress, or use phrases such

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as "the capital investment required" or phrases similar to that. I don't think we can look at it here.

However, we get back to the question of good faith bargaining, and there is something that transcends good faith bargaining. If an employer, even under the National Labor Relations Act, claims a financial burden, upon demand they are required to furnish that information.

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Gentlemen, unless we can come to some accord in the matter, the Court reserves decision.

I will now turn to counsel and inquire the earliest time at which they can present the Court with proposed findings and conclusions, documented to pages of the testimony and to exhibits and the pages of those exhibits, and the exhibits are voluminous.

I will ask first, since I want you to do it in the shortest period possible, first inquire of defendants' counsel when he could serve and file his proposed findings and conclusions, which would lead the Court from his point of view to deny a preliminary injunction, and I will ask counsel for the plaintiff if he could match that timetable.

MR. ENGELHARD: May we approach the bench, your Honor, off the record?

(Discussion at the bench)

MR. ENGELHARD: If your Honor please, it is our intention to serve and file the findings and conclusions on or before 5 o'clock, Wednesday afternoon of next week.

THE COURT: Mr. Gartner, I would ask you to match that so that both sides would file their findings and conclusions by -- Miss Kruger indicates to me that, although I expect to be on trial on Wednesday, the 12th, the Law Journal indicates that that is Lincoln's Birthday and is a

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court holiday, so that the clerk's office is closed. Perhaps we could either suggest 5 o'clock on Tuesday, the 11th, or 5 o'clock on Thursday, the 13th.

MR. ENGELHARD: I will make it at 10 o'clock on the 13th, your Honor.

THE COURT: All right.

MR. ENGELHARD: We don't have holidays.

THE COURT: We will be here. I would appreciate, if you could, that you deliver a copy to the Court, so I will have that extra night to work on it.

Mr. Gartner, then you will deliver a copy of your proposed findings of fact to the Court at 5 o'clock on February 12 and file the plaintiff's proposed findings and conclusions by Thursday, February 13, at 10 a.m.

MR. GARTNER: The plaintiff to file his proposed findings by Thursday at 10 a.m.

THE COURT: Both sides to do that.

MR. GARTNER: Both sides.

THE COURT: However, I would appreciate that the attorneys deliver to the Court copies of their papers by 5 o'clock on the 12th. Could you do that?

MR. GARTNER: Oh, yes, of course, your Honor.

THE COURT: I suggest the 13th as a filing date, because the Court's clerk's office will be closed on the

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12th.

MR. GARTNER: Of course. Yes, your Honor.

THE COURT: If you gentlemen will deliver your proposed findings and conclusions to the Court by Wednesday, the 12th, at 5 p.m., I will at this time indicate to you that I intend to file an opinion granting or denying the motion for a preliminary injunction by 5 p.m. on February 19, which is the Wednesday after you present me with the papers. In other words, I will undertake to file an opinion in this case by Wednesday, February 19, at 5 p.m.

In view of that, the Court, having heard witnesses and received exhibits and heard extensive argument and having requested and expecting to receive detailed findings and conclusions of counsel by February 12 at 5 p.m., extends the temporary restraining order heretofore issued until Wednesday, February 19, at 5 p.m.

MR. ENGELHARD: May I be heard, your Honor?

THE COURT: You may.

MR. ENGELHARD: I respectfully request that the temporary restraining order which is presently in effect and the one which you just indicated would be extended be vacated on the grounds that it is a violation of the provisions of the Norris-LaGuardia Act, which specifically sets forth that no such temporary restraining order can be in effect for more

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than five days.

THE COURT: The application is denied Thank you, gentlemen.

MR. GARTNER: Thank you very much, your Honor.

MR. ENGELHARD: Thank you, Judge.

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